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No. 16282

United States

Court of Appeals

for the Ninth Circuit

REXALL DRUG COMPANY, a Corporation, and ARNOLD L. LEWIS, Doing Business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a Minor, by Her Father and Guardian John Nihill, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 409 to 812, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-2-59

See also Vol. 3165

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(Testimony of Mrs. John W. Nihill.)

Q. Of what?

A. Of the pin curl solution.

Q. The second ten minutes? A. Yes.

Q. All right? What happened?

A. She started to make the test curl and she lacked two minutes of being ten minutes and when I came back and saw her, she left it up until the ten minutes were up, and then she rinsed it.

Q. And that was a two-minute difference?

A. Yes, sir.

Q. So you had her put it back for the other two minutes? [90] A. Yes, sir.

Q. All right. Do you, of your own knowledge, Mrs. Nihill, know how often before Sandra had had a home permanent wave?

A. You mean before this last one?

Q. Before the Cara Nome?

A. It must have been about a year and a half.

Q. And what was used at that time?

A. A Toni.

Q. Is that the only one, or not, that she ever had?

A. Yes. Before that she wore long braids.

Q. What was the result of the Toni wave?

A. It was beautiful.

Q. Now, Mrs. Nihill, when did you first notice any change in Sandra's hair after the permanent?

A. It was about a week afterwards.

Q. And what did you notice?

A. Well her hair was starting to come out.

(Testimony of Mrs. John W. Nihill.)

Q. How long did that continue before you became alarmed?

A. Well within about ten days after that, I was still kind of wondering what was causing it and about that time my brother-in-law died in Seattle and I had to go there, but before I left I told them to be sure to take Sandra to the doctor and see what was causing her hair to fall out. [91]

Q. She actually went to the doctor the first time while you were in Seattle? A. Yes, sir.

Q. All during this time and up to the time that you left for Seattle, will you tell the jury whether or not there was any eyebrow loss?

A. No there was not.

Q. Had there been any eye lash loss?

A. No.

Q. Now when you got back Sandra had already been to see Dr. Martin? A. Yes.

Q. Now, will you tell the jury, between there and commencement time, what the general condition of Sandra's hair was, which would be the end of May?

A. Well, it just gradually fell out; it was coming out so that on the 26th of May she had very little hair, but there was just enough so we could kind of comb it, so she would have a light covering on her *hair.*

Q. For the purpose of commencement?

A. Yes.

Q. Now, will you tell the jury what the condition

(Testimony of Mrs. John W. Nihill.)

of her hair was by the time of Confirmation, the middle of June?

A. She was practically bald. [92]

Q. When did you first notice Sandra's eyebrows beginning to disappear?

A. That was about the time I noticed that her eyebrows were beginning to go.

Q. About that time? A. Yes.

Q. Had you noticed any change in her eyebrows at all up to Commencement time, May 26th?

A. No.

Q. That wasn't until about the middle of June then? A. Yes.

Q. Did that or not alarm you?

A. Yes it did.

Q. Did you send her back to Dr. Martin again?

A. Yes.

Q. And that was on July 6th? A. Yes.

Q. And that's the time that he referred her to Dr. Melton? A. Yes.

Q. You were not there originally at the time that the use of selsum was prescribed?

A. No, I wasn't.

Q. Did you ever apply it for her?

A. Do what?

Q. Did you ever apply the selsum for her? For Sandra? Did you ever put it on her head? [93]

A. No. My older daughter did.

Q. Now, Mrs. Nihill, will you tell me, when Sandra's hair started falling out and started really

(Testimony of Mrs. John W. Nihill.)
getting to be very thin, will you tell me and the jury the effect that it had on Sandra?

Mr. Packard: This calls for a conclusion, your Honor.

The Court: Well, she may answer the question if she will confine her answer to the descriptive terms, not to some conclusions that she may arrive at.

Mr. Lanier: You may answer now.

A. Well, she began to—she was hurt you could see that. Many times I found her crying and I would ask her what was wrong. She wouldn't tell and I'd ask her if she was sick she wouldn't tell. She began to get embarrassed. She didn't want to go out with us.

Q. Did you have difficulty getting her to go out places with the other children?

A. Yes, sir. She didn't even want to wear her dresses, and if I wanted to buy her a new dress she would say "Oh, I can't wear that, I can't look dressed up." (The witness is crying.)

Q. Now you just take your time, Mrs. Nihill. [94] Toward the end of that year, that first year, which would be in the early part of May, I believe that there was a Junior Prom, was there not?

A. Yes, there was.

Q. Did she go to it?

A. She refused to go to it. That night she took her horse and she went for a ride and when she came back I could see she had been crying. I didn't

(Testimony of Mrs. John W. Nihill.)

have to ask her why. (Witness is crying.) I knew the answer.

Q. Mrs. Nihill, as a matter of fact, when you would find Sandra crying, would she admit the reason why? A. No, she would not.

Q. Has she ever admitted to you, and does she admit, that she has herself been injured?

A. No, she didn't then and she won't now. It just seems like she just wants to shrug it off.

Q. And the other things you feel affect her are what you actually observed?

A. Well her marks in school have gone down, she doesn't seem to want to put on a pretty dress for fear that she might have one that will be prettier than some other girl's. I don't know, it just affected her whole personality.

Q. Have you noticed a change in her personality since this has happened? [95]

A. Oh, yes, she has no self-confidence anymore. She's afraid.

Q. Did you go into Fargo with her on August 9th to see Dr. Melton? A. I did.

Q. Does she have any boy friends?

A. No, she has not.

Q. Did she use to have?

A. She use to have admirers.

Q. Prior to this accident, did she mix and associate, generally speaking, as the others, with her classmates? A. Yes, she did.

Q. Does she do it now?

A. No, not so well.

(Testimony of Mrs. John W. Nihill.)

Q. After noticing the hair effect, Mrs. Nihill, did you ever go back in and notify your druggist of the effect?

A. I did. In fact I bought—the same prescription that Dr. Martin gave to me for Sandra's hair was bought at the Rexall Drug Store at Kinsal.

Q. That was the hair prescription given by Dr. Martin? A. Yes.

Mr. Lanier: Your witness. [96]

Cross Examination

Q. (By Mr. Packard): Now, Mrs. Nihill, isn't it a fact that the testimony you just gave us relative to the manner in which this cold wave was given was based upon the reading of the instructions and directions solely?

A. Yes, we read and followed the directions right to a "T."

Q. Isn't it a fact you read the instructions last night?

A. Maybe I did to refresh my mind a little.

Q. Well you say "maybe," you did, didn't you?

A. Yes I did.

Q. And, isn't it a fact your testimony here today is based upon what you read last night in the instructions, not what you recall back on February 5, 1955? A. No, it is not.

Q. And your testimony that you are giving is based solely upon your recollection, which has been refreshed by the reading of the instructions. Is that your testimony? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you recall this morning, at quarter to ten you walked into the courtroom, and I happened to be seated right here, and your attorney Mr. Lanier said to you "Did you read the instructions——

Mr. Lanier: One moment if the Court please. One moment. [97]

Mr Packard: This is proper cross examination.

Mr. Lanier: Counsel is going entirely—I don't know even what he is going to bring out, and don't much care, it's just that it's not proper and regular.

Mr. Packard: All right.

Mr. Lanier: He is going beyond the scope of the examination; he is going beyond anything in the testimony and it's improper examination——

Mr. Packard: All right. I don't think it is improper.

Mr. Lanier: (Continuing) ——unless he was using it for impeachment purposes, your Honor, and the witness has testified that of course she refreshed her memory last night by going over the directions.

Mr. Packard: This is proper.

The Court: That's perfectly proper to cross examine her about that. It is always done. I don't know what you are referring to here. In fact I didn't follow the question. [98] I was trying to read the instructions. That's the first time I've seen them.

Mr. Packard: I'll reframe the question.

Q. (Mr. Packard, resuming): Mrs. Nihill, isn't it a fact that this morning at quarter to ten you walked in this courtroom, and you were standing

(Testimony of Mrs. John W. Nihill.)

right over here and I was seated over at the counsel table and your attorney Mr. Lanier came up to you and said "Did you read the instructions?" Now, isn't it a fact he asked you that question?

A. Yes, he did.

Q. And is it not a fact, at that time, that you told your attorney that you are supposed to put the neutralizer on after the solution? Isn't that a fact? A. Yes, sir.

Q. Yes. That is because you recall the testimony in Court here where the solution was poured over the head and you read the instructions and you found out last night that the neutralizer should have been put on afterwards?

A. No, sir; I knew that when I was sitting back there listening to you, and you were mixing everybody up by calling this a solution and this a solution. [99]

Q. I don't want to confuse anyone. I wasn't mixing anyone up. That testimony came from the reading of the depositions and I was not present then and that's where you gather that there was confusion as to which was put on first and last, isn't that correct?

A. No, sir. When you were cross examining Sandra yesterday you were asking if this solution was put on and this solution. I don't know how many of these men are acquainted with this home permanent, but if you call both a solution—as soon as you put neutralizer with the water, doesn't it become a solution?

(Testimony of Mrs. John W. Nihill.)

Q. All right. Let me ask you this——

A. How are you going to tell which one of the solutions are you going to have? They are both a solution. There's a pin curl lotion and also the neutralizer.

Q. I want to apologize and I don't want to upset you, but you are at a little disadvantage because I'm the only one that will be asking questions. I'm sorry I can't answer your question, but you just answer my questions. Now, let me ask you one further question. You recall the testimony about the fact that Sandra was taken to the wash basin over the sink. Is that correct? A. Yes, sir.

Q. And what was put on her head there at the sink? [100]

A. That was the neutralizer.

Q. All right. Calling your attention to your deposition.

Have you got the deposition file of Mrs. Nihill?

(The Clerk furnished counsel with the deposition of Mrs. Nihill.)

Mr. Packard: Counsel, will you stipulate that the proper foundation has been laid, the deposition has been taken and there's been no corrections in the deposition?

Mr. Lanier: So stipulated.

Q. (By Mr. Packard, resuming): Now I believe you have already testified that the solution—there's a solution in the bottle, isn't that correct? A certain solution comes in the bottle?

(Testimony of Mrs. John W. Nihill.)

A. Yes, at the time—yes.

Q. There's a certain solution——

A. The pin curl lotion is a solution.

Q. That's a curl lotion in the bottle—right?

A. Yes.

Q. And there is a neutralizer which you mix by taking a little powder that comes in a little package and you mix that with water, you testified to the court, and so fourth. Is that correct?

A. Yes, and it becomes a solution. [101]

Q. All right. Now, calling your attention to your deposition which was taken on August 1, 1957, in Jamestown, North Dakota, and calling your attention to page 5, line 10, the following questions and answers were propounded to you by Mr. Lanier:

"Question—And where was this solution at the time?

Answer—Well, it was in the bottle. I guess that's where it was. Then she poured it into the dish, or half of it rather. That is the way it is supposed to be.

Question—And then after that what was done next?

Answer—Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Now, do you recall you were asked those questions and you gave those answers on August 1, 1957?

Mr. Lanier: Now, may it please the Court, I

(Testimony of Mrs. John W. Nihill.)

have no objection whatever to the offer nor the answers, but I want the entire context, not part of it. I request that counsel read the answer also starting at line 2 immediately preceding that question and answer.

Mr. Packard: Well, counsel, you can follow your own procedure. You can bring out any portion of the deposition you want. This is my cross-examination and I'll read [102] whatever portion I desire.

Mr. Lanier: I think we'll leave that to the Court, counsel; but, your Honor, there is no point in ever confusing a witness and taking a sentence out of context. The entire question and answer series should be asked.

Mr. Packard: Just a moment here, your Honor. I am following my proper right to cross-examination. If counsel has any objections to make I think he should state them on legal grounds.

Mr. Lanier: I just made it, counsel.

The Court: Overruled. You may answer the question. Did you get the questions and answers he asked you about?

The Witness: I'm afraid I forgot it.

Mr. Packard: My question is, Mrs. Nihill, do you recall being asked those questions and giving those answers at the time your deposition was taken on August 1, 1957, in Jamestown, North Dakota?

A. I suppose if you have it down it must be right. I don't recall. [103]

(Testimony of Mrs. John W. Nihill.)

Q. And you did then read the instructions last night? A. Yes, I did.

Q. And when was the last time you read them before last night?

A. The time we gave the permanent.

Q. Now you stated that after this permanent had been given to your daughter, you had an unfortunate death in the family and you went to Seattle? A. Yes, I did.

Q. And for what period of time were you in Seattle?

A. Well I was home—I wasn't there very long, because I was home about the first of March—no, I was home about the—I was home by the 16th—I was home before the 16th, but I can't just remember what day I did come home, but it was before the 16th of March.

Q. All right. About the middle of March. Is that correct?

A. Well I can say it was before the 16th because——

Q. Do you recall filing your income tax? (Laughter.)

A. I had a grandson born that night.

Q. Now, before you—I'm not sure I recall, did you say you left about one week or ten days after this cold wave was given?

A. Well, let's see, it might have been about the 20th or 21st, somewhere along in there.

Q. It was before Sandra had gone to the doctor. Is that [104] correct? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you left instructions that "I think maybe you should go to the doctor", or——

A. No, I didn't say "I think", I said "Take her".

Q. Now, after this cold wave was given, what was done with the bottle at the time the cold wave was given?

A. Well, I had three barrels out there where I put my cans in and I threw it out in that.

Q. And how often do you dump those barrels?

A. Well, it all depends on how fast they get full.

Q. Well, that sounds like a logical answer. Normally, how often do you dump those barrels?

A. Well, I just can't tell you.

Q. What I'm getting at is——

A. Oh, in the Spring I usually clean the yard and then we haul them off.

Q. When did you get this empty bottle with cold wave solution which has been produced here in court?

A. Well you see I turned it over to—I went up to see Mr. Roney, and he asked me if I could find this bottle.

Q. And when did you first see Mr. Roney?

A. That, I couldn't exactly say.

Q. Well, approximately?

A. Well, it was after I began to get worried about Sandra's [105] hair and everything. I just can't tell you when.

(Testimony of Mrs. John W. Nihill.)

The Court: Will you identify Mr. Roney? I don't know who he is.

Mr. Packard: Yes. Mr. Roney is an attorney, your Honor. Is that correct?

The Witness: Yes, he is an attorney.

Q. And where does he practice?

A. Carrington.

Q. And is that near Kensal? A. Yes.

Q. How far? A. About thirty miles.

Q. Thirty?

A. About thirty miles. It's the county seat of our township.

Q. Now was that before graduation?

A. Oh, no. No, it couldn't have been. I just don't remember when I did go out there and get that.

Q. Well, I'm talking about when did you see Mr. Roney?

A. No, we hadn't—we weren't too alarmed about Sandra's hair even at the time of the graduation although it was—— [106]

The Court: Try to fix approximately the time when you went to see him. Relate it to some event you remember about.

The Witness: Well, I think it probably was in June maybe—after she started losing her eyebrows and eyelashes.

Q. And that's the time when you became alarmed, really became alarmed when the eyelashes—— A. Yes.

Q. About in June? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And at that time you went to see Mr. Roney?

A. Yes.

Q. And is that the time that Mr. Roney asked you to get the bottle? A. Yes, sir.

Q. And then in June, or sometime around in June, is that when you went back and looked for this bottle? A. Yes, sir.

Q. Where did you find it?

A. In those barrels.

Q. Were those barrels open barrels—did they have a lid on them, or——

A. They are open barrels.

Q. And I take it that you had a considerable amount of rain, it rains in North Dakota, doesn't it, like it does in [107] California?

Mr. Lanier: Not quite, counsel. (Laughter.)

Q. You probably don't remember and I am interested in knowing, but you have—what is your normal rain-fall in North Dakota—maybe I should say "snow-fall"?

A. Some days we have more and some we have less. I just don't know.

Q. Well, what is the normal—ten inches, twenty inches, fifteen inches?

A. I couldn't tell you that. The more rain, I know, the better crops we get.

Q. Did you have pretty good crops in 1955?

A. I don't remember that.

Q. And when you gave this cold wave that was being given to Sandra, you used this towel at all times, didn't you, to see that it didn't get down

(Testimony of Mrs. John W. Nihill.)

over her forehead or into her eyes, isn't that correct? A. That's right.

Q. And you took all the precautions you could to keep the solution out of her eyes?

A. We did.

Q. What is Sandra's natural color of her hair?

A. Sandra was kind of a blonde, or Sandra was a blonde.

Q. Light hair, is that correct? A. Yes.

Q. The reason I ask that is it appears now the hair she has to be light colored and the pictures appear dark. Did she ever have her hair tinted?

A. No, she never did.

The Court: Let's see the one I want—this one. At the this picture here was taken, was her hair blonde at that time?

The Witness: Well not a real blonde, but I would say——

The Court: Rather light than dark?

The Witness: Yes.

Q. (By Mr. Packard, resuming): I mean I looked at the picture and it looked like it was black and then I thought in court the hair looked blond. A. No.

Q. Do you have any beauty shops or beauty salons in Kensal? A. No.

Q. Now do you recall—did you take Sanda to Dr. Melton—did you go with Sandra to Dr. Melton? A. Yes, I did.

Q. And I take it that you had certain conver-

(Testimony of Mrs. John W. Nihill.)

sations with [109] Dr. Melton relative to her condition. Is that correct? A. Yes.

Q. And after he examined Sandra he gave a prescription of thyroid. Isn't that correct?

A. Yes.

Q. And you had that prescription of thyroid filled. Isn't that correct? A. Yes, I did.

Q. Then you stopped, or quit giving Sandra this thyroid, didn't you?

A. Yes. On the instructions she was only supposed to take them so long.

Q. Did you consult Dr. Melton before you stopped this thyroid? A. Well, no.

Q. Isn't it a fact that you felt that Sandra was getting larger around the waist and so you had her to quit the thyroid? A. No.

Q. Now, did Dr. Melton instruct you to go back and see Dr. Martin at any time, or that he would cooperate with Dr. Martin in any treatment or care to be rendered Sandra?

A. No, he did not. The only thing he said was that Sandra should go out in the sun but, above all things, not to sunburn her head. That would be worse than anything else she could do for it.

Q. Now these thyroid pills they were given orally. Is that correct? She took these pills orally?

A. Yes.

Q. Was that the only medication or treatment that she received after she saw Dr. Melton?

A. Yes.

Q. That's the only treatment she received to

(Testimony of Mrs. John W. Nihill.)

the present day, is that correct? A. Yes.

Q. What type of care does she presently give her hair insofar as shampoo or washing her hair?

A. Well, she can't brush it too much because what little she has, it falls out.

Q. Does she wash her hair?

A. She puts oil on it once in awhile. Yes she washes it.

Q. She puts oil on once in a while?

A. Once in awhile.

Q. What kind of oil?

A. She used some of this baby oil for awhile, this like you get in baby kits and she got some lanolin.

Q. Does she use shampoo on her hair?

A. Yes, Dr. Melton recommended Breck's shampoo, but we used that for many years.

Q. What type of Breck's shampoo?

A. Well there's different types. If your hair is oily you get Breck's shampoo for oily hair. If your hair [111] is normal, then you get the other kind.

Q. What type did Sandra get?

A. For dry.

Q. Was that the oily or the standard, regular?

A. Regular.

Mr. Packard: That's all the questions I have.

Further Cross Examination

Q. (By Mr. Bradish): Mrs. Nihill, you were present here yesterday when the deposition of Mrs. Brill was read. Were you not?

(Testimony of Mrs. John W. Nihill.)

A. Mrs. Briss?

Q. Briss—were you not? A. Yes, sir.

Q. And did you listen to the questions and answers that were read from that deposition?

A. Yes.

Q. Well, as I recall those questions and answers, Mrs. Briss indicated that she took the bottle of solution and put half of it in a bowl, and then poured the other half of it over Sandra's head. Did you hear that?

A. Which solution are you referring to now?

Q. From the bottle.

A. No, she did not do that.

Q. Well, did you hear that testimony of Mrs. Briss read yesterday, to that effect that she had done that?

A. I don't remember. If I did, I know she didn't do it because I was there and I saw how it was done.

Q. Now, from the time this procedure started until it was completely finished, did you leave the room at any time? A. Yesterday?

Q. No, ma'am. The procedure when the cold wave was given to Sandra? A. No.

Q. I understood on direct-examination that this delay in time involved the second ten-minute timing period in this application. Is that right?

A. Yes.

Q. And I thought I heard you say "When you came back", you found that they were taking a test

(Testimony of Mrs. John W. Nihill.)

curl and you told them that it was not yet time to do that. Is that right?

A. Yes, sir.

Q. When you say you came back, where did you come back from? [113]

A. Well, we have large kitchens in North Dakota.

Q. Well, did you come back from the same room?

A. Well, yes; I was in the same room when I came back to where they were sitting.

Q. Well, where had you been before you came back to where they were sitting?

A. Probably on the other side of the room.

Q. Do you recall that? A. Yes.

Q. Do you recall what you were doing on the other side of the room?

A. Well, I can't exactly say. Three years is quite a long time to be remembering.

Q. Yes, ma'am, but you don't have any trouble remembering exactly what took place, step-by-step, in the application of this cold wave to Sandra's head three years ago, do you?

A. Well, no; I remember that.

Q. You remember that.

A. But I am also a mother. I have family duties to attend to too.

Q. All right.

The Court: Mrs. Nihill, just answer the questions and don't try to explain your answers. It's not necessary to do that. [114]

Q. Now, I believe you told us that you went

(Testimony of Mrs. John W. Nihill.)

to the drug store in Kensal for the sole purpose of purchasing Rexall Cara Nome wave set?

A. Yes, sir.

Q. And do you recall Sandra being with you?

A. Yes, sir.

Q. And when you went in did you look at any other type of wave sets?

A. Well, Sandra had seen this Cara Nome pin curl advertisement and she learned to make pin curls and she thought she could put it up herself. That is the reason we bought it.

Mr. Bradish: Your Honor, may that answer be stricken as not responsive to the question.

The Court: It may be stricken. Ask the question again and let her answer it directly.

Mr. Bradish: Yes, sir.

Q. (Mr. Bradish, resuming): Mrs. Nihill, when you went into—this is Olig's Store, isn't it?

A. Olig's Rexall Drug Store, yes.

Q. Yes, and that's what the sign says out in front, "Olig's [115] Rexall Drug Store." Doesn't it? A. Well, I believe it does, yes.

Q. All right. You know Mr. Olig pretty well. You have for several years, haven't you?

A. Yes, I have.

Q. When you went in there to get this wave set you went in with the sole purpose of getting a Cara Nome set—you told us that?

A. Yes, sir.

Q. Now after you got in there, isn't it a fact

(Testimony of Mrs. John W. Nihill.)

that you looked at several other sets before you bought the Cara Nome set? A. No.

Q. You didn't look at any others?

A. No, sir.

Q. Were you here when Sandra testified yesterday that you looked at several sets before you decided on the Cara Nome set?

A. I don't remember her saying that. I thought the question was "had she seen", or did he have different kinds.

Q. All right. Well, now, you picked up this guarantee in the store that day. This Exhibit No. 7? This No. 7 you picked up that particular day in the store? A. Yes, sir. [116]

Q. And you went in there to buy this Cara Nome because you had used Cara Nome products for quite some time? A. Yes, sir.

Q. And you relied upon them as being safe and good products? A. Yes, sir.

Q. And you had seen them advertised in various periodicals before that time? A. Yes, sir.

Q. Is that correct? A. That's right.

Q. And there was no doubt in your mind when you went in and asked for this Cara Nome set that it was as good a set as you could get, and that's what you wanted? A. Yes, sir.

Q. And you had no doubt, did you, that the Cara Nome set would give Sandra a good wave and you didn't consider the fact that there might be some bad results from the use of that set?

(Testimony of Mrs. John W. Nihill.)

A. No, sir, I did not; if I had of I would never have bought it.

Q. But yet you picked up this guarantee and took it home with you, didn't you?

A. I just picked that up for a kind of a laugh. I never [117] thought I would ever use it.

Q. Well, did you keep it for kind of a laugh after the——

A. I have a little thing up on the wall that I stick stuff like that in—coupons, premiums and all those things.

Q. Well, did you read this guarantee when you picked it up in the drug store?

A. Yes, I did.

Q. You knew what it said, didn't you?

A. Yes.

Q. And did you feel when you picked this guarantee up that you would at any time want to come back and get double your money back?

A. No, I didn't.

Q. You didn't see anything on this guarantee, did you, that said that Cara Nome was perfectly safe and nothing would happen to anybody that used it, did you?

Mr. Lanier: If the Court please, the exhibit will speak for itself, on what it says.

The Court: Yes, that's true, Mr. Bradish.

Q. (By Mr. Bradish, resuming): Now, you have another exhibit there which, from my casual observation, appears to be a duplicate of the guarantee of Plaintiff's Exhibit 7, [118] and that is

(Testimony of Mrs. John W. Nihill.)

Plaintiff's No. 28, this little green one. On one side it has "Cara Nome Natural" and on the other side it has something, "Rexall Anapac" for cold remedy. Is that right? A. Yes.

Q. Do you recall ever seeing the other side of that little guarantee that refers to "Anapac"?

A. I must have read it, but I just don't recall——

Q. You don't recall seeing that. Do you recall seeing it on this one?

A. No, I don't remember.

Q. You don't recall seeing anything about "Anapac" on No. 7, do you? A. No.

Q. Do you see it in the back there?

A. Yes.

Q. Now, I believe you said, Mrs. Nihill, that the first time that you thought about retrieving this bottle which contained the wave solution, as distinguished from what you call the neuralizing solution, the first time that you retrieved this little bottle was sometime around about June when you saw your lawyer in Carrington. Is that right?

A. Yes, sir.

Q. Up until that time you hadn't concerned yourself with [119] preserving any of the remains of the package of cold wave, had you? A. No.

Q. Well, when was it, ma'am, that you—strike that. After this cold wave was given, what did you do with the box that the bottle and the pin curls and everything came in?

A. I suppose they probably got burned up.

(Testimony of Mrs. John W. Nihill.)

Q. Got burned up. How about the package that the neutralizer came in, that got burned up too?

A. I imagine.

Q. And isn't it a fact that after you completed the giving of this permanent everything that was left that would burn up got burned up?

A. The bobby pins we threw away because they were rusted.

Q. And the bottle, you threw out in the can box? A. Yes, sir.

Q. All right, and everything else that would burn got burned up. Isn't that right?

A. Well not everything.

Q. Well, what didn't get burned up?

A. The little guarantee slip. Like I say, I always stick them up in that little packet of a thing I have hanging on the wall.

Q. Oh, you stuck this little green thing up on the wall? A. Yes, sir. [120]

Q. And was it stuck up on the wall there along with the larger one, which is Plaintiff's Exhibit No. 7? A. Yes, sir.

The Court: Let me ask her one question here for my own information.

Where did you say that you got the little green guarantee?

The Witness: Out of the kit.

The Court: Out of the kit itself.

The Witness: Out of the kit.

Q. (By Mr. Bradish, resuming): So you had

(Testimony of Mrs. John W. Nihill.)

both the larger one and the little green one stuck up on the wall together, is that right?

A. Yes, sir.

Q. How many other things did you have stuck upon the wall there?

A. Oh, I have—save my coupons you know, like gift towel stamps and green stamps and things like where you get little premiums from, I put them all up in this little place and then when I get enough I get something for them.

Q. Well, those things you use to redeem to get some [121] merchandise.

A. Oh, well, there's other things too I stick up there.

Q. For example what?

A. Oh, well, I just can't really say.

Q. Guarantees such as this that give you your money back?

A. Yes, I put that up there, yes.

Q. You put that up there? A. Yes, sir.

Q. Now, can you tell me when in relation to the time that you gave Sandra this cold wave, when was it that you put that little green slip up there on the——

A. I put that up there that very night after we opened it.

Q. That very night after you opened it?

A. Yes, sir.

Q. And you had no reason then to have any feeling that there was going to be anything wrong with that cold wave? A. No, I did not.

(Testimony of Mrs. John W. Nihill.)

Q. When was it that you put the big one up there? A. The same night.

Q. The same night? A. Yes, sir.

Q. Did you put them both up there at the same time? [122] A. Yes, sir.

Q. Did you read them before you put them up there?

A. Well, I glanced through it, that was it. And we read them in the drug-store.

Q. You did. Now, you were the one that bought this Cara Nome kit and paid for it?

A. Yes, sir.

Q. Now, the only prior cold wave that Sandra had had was about a year and a half before this when a Toni set was used. Is that right?

A. Yes, that's right.

Q. Did Mrs. Briss also give her that?

A. She did.

Q. And then for that year and a half period, from the time the Toni wave was given until the Cara Nome wave was given, she didn't have any permanent wave in her hair at all, did she?

A. No.

Q. Did she have any—what is it you ladies call it when you go to the beauty parlor and they set your hair or something—did she have any assistance in curling her hair or keeping her hair curled at all, other than the Toni, up until the time she got the Cara Nome set?

A. No, only that she use to—at night she use to

(Testimony of Mrs. John W. Nihill.)

wet [123] her hair and pin curl it. She did that herself.

Q. I see. Now, what was the condition of her hair at the time that this Cara Nome wave was given on February 5, 1955? And by that I mean, what was its condition insofar as being curly or straight? A. It was straight.

Q. It was straight. And she wore it in a pony tail? A. She did.

Q. How long before February 5th had her hair been straight and worn in a pony tail?

A. I just can't say—for quite some time.

Q. Well, would it be three or four months?

A. Maybe six months.

Q. Six months. So for the last six months before she got the Cara Nome wave, her hair was straight and worn in a pony tail. Is that right?

A. That's right.

Q. Were you here in Court when this picture which bears "Plaintiff's Exhibit No. 31" was offered in evidence? A. Yes.

Q. Were you here when the photographer testified that that was taken in January of 1955?

A. Yes. That was taken on January 20, 1955.

Q. January 20, 1955. That would be about fifteen days [124] before she was given the Cara Nome treatment. Is that right? A. That is right.

Q. Is her hair, as it is shown in that picture, what you commonly refer to as being worn in a pony tail?

(Testimony of Mrs. John W. Nihill.)

A. Yes, it's quite long in the back; you can't see it from here.

Q. Would you say ma'am, that the hair shown in that picture is straight?

A. No, it is not straight, but it's curled because of the pin curls that she put in it.

Q. Now, when you went in to this drug-store to get this Cara Nome, you went in there to buy that particular kind because you wanted to get the best for Sandra's hair, didn't you?

A. Yes, and besides it was a pin curl and she had learned to make pin curls and she thought she could put it up herself, but Mrs. Briss said she would come over and help her.

Q. Well, the results of the Toni that she had had a year and a half before this one, I believe you said it was beautiful? A. Yes, it was.

Q. You didn't go back to get another Toni set?

A. No. [125]

Q. Now, you told Mr. Lanier that you notified this druggist about the results of this wave that Sandra had? A. Yes.

Q. You did that at the time that you had him fill the prescription for this selsum?

A. Yes, he knew at the time I filled the prescription that her hair was starting to fall out.

Q. And that was about when ma'am?

A. Well they got the prescription on the 28th of February, 1955.

Q. 28th of February? A. Yes.

(Testimony of Mrs. John W. Nihill.)

Q. And you told him then that her hair was starting to fall out? A. Yes.

Q. And you watched Sandra's progress insofar, or you watched her condition as it developed over the months from February 28th on up until the time you saw your lawyer in June over in Carrington, didn't you? A. Yes.

Q. And isn't it true that during that entire period of time that her hair kept coming out more and more and she kept having less and less hair?

A. Yes.

Q. That was through March, April and May—three months, is that right? A. Yes.

Q. And just before you left for Seattle, you told somebody in your family to take Sandra to Dr. Martin, which was done on February 28th?

A. That's right.

Q. And you returned Mrs. Nihill sometime before March 16, 1955? A. That's right.

Q. And from March 16, 1955, up until June, you knew that Sandra's condition was getting worse, didn't you, from what you observed?

A. Yes. I never heard of such a case like that before. I couldn't make myself believe that it wouldn't come back.

Q. Well, Mrs. Nihill, before you left for Seattle, you told somebody to take Sandra to the doctor because her hair was coming out. Isn't that right?

A. That is right.

Q. All right. Now, from the time you returned on the 16th of March up until the time she went

(Testimony of Mrs. John W. Nihill.)

back to Dr. Martin for the second time on July 6th, during that [127] period of time, March 16th until July 6th, did you ever once ask—suggest—or take her to Dr. Martin for further observation and treatment? A. No, I didn't.

Q. And then I believe that you went to Fargo with Sandra to see Dr. Melton?

A. That is right.

Q. And you first went there I believe it's testified on August 9, 1955? A. That's right.

Q. Did you go with her every time she went?

A. Yes, sir.

Q. How many times did she go in all?

A. We have seen Dr. Melton I believe about four or five times.

Q. And isn't it true that the last time that she went to Dr. Melton was in sometime in September of 1955?

A. Well, I believe we had seen him later than that, but that was one of the last times, yes.

Mr. Packard: It was the 21st, my birthday.

Q. I remember now, when that date was read from the deposition, I think it was September 21, 1955, because Mr. Packard told me it was his birthday. All [128] right, Doctor Melton has testified that the last time he saw Sandra for treatment at all was on September 21, 1955. Would you say that that is correct from your recollection?

A. Well I can't exactly say. I haven't got my books here or anything.

(Testimony of Mrs. John W. Nihill.)

Q. Well, as near as I can figure it, Mrs. Nihill, from August 9, 1955, until September——

The Witness: Mr. Lanier, when was that new medical building built?

Mr. Lanier: Sorry, I can't answer.

Mr. Bradish: You know if you ask him that question he will have to get up there on that stand and I'd love to have him up there. (Laughter.)

A. I can't just exactly say, but they built a new building in Fargo and—farther out—and they had just moved in there and we took Sandra there the last time and at that time he said he could see very little difference.

Mr. Bradish: Counsel, will you stipulate that the last time this lady was seen by Dr. Melton was in September of '55?

Mr. Lanier: I believe that's correct, counsel.

The Court: September 21st?

Mr. Bradish: September 21, 1955. Thank you.

Q. Now, Mrs. Nihill, since September 21, 1955, until the other day when Sandra went out here to Dr. Levitt, during all of '56 and all of '57 and all of '58 up to the present time that she went to Dr. Levitt, during that two years and some six or seven months, did you ever take Sandra to Dr. Martin or to Dr. Melton or to any other doctor for treatment or observation of her hair condition?

A. No.

Q. You did take her, ma'am, over to Minneapolis, did you not? A. Yes.

Q. And she got a hair piece over there?

(Testimony of Mrs. John W. Nihill.)

A. We took her to see this Dr. Starr in Minneapolis too.

Q. Not Dr. Starr, you mean Dr. Michelson?

A. Michelson.

Q. That was in the middle of March of 1956. All right. Dr. Michelson examined her on that one occasion? A. That's right.

Q. But, other than the examination by Dr. Michelson, she had no attention—medical attention—for her hair [130] condition from September of '55 until she was examined by Dr. Levitt here the other day. That's a correct statement, is it not?

A. I believe that is right.

The Court: When was Dr. Michelson's examination?

Mr. Bradish: Dr. Michelson's was in March of 1956, your Honor.

The Court: Do you remember it that way?

The Witness: Yes, I believe that's right.

The Court: Very well.

Q. (By Mr. Bradish, resuming): Do you remember, Mrs. Nihill, the magazine or periodical in which you say you read something about Cara Nome products?

A. Yes, I believe it was the Farm Journal.

Q. You believe it was the Farm Journal?

A. Yes.

Q. Do you know when it was, approximately?

A. Oh, they have advertisements in there right along.

Q. Well, I'm restricting my question now to

(Testimony of Mrs. John W. Nihill.)

Cara Nome products. When was it, if you know, that you ever read anything about Cara Nome products in the Farm [131] Journal?

A. Well, I think practically every time they came out they had some Cara Nome products in their advertising.

Q. And how often does the Farm Journal come out?

A. I believe it's once a month, I'm not sure.

Q. Well, did you at any time before February 5, 1955, read anything about Cara Nome products in the Farm Journal? A. Yes.

Q. When before that date?

A. It must be maybe '54, part of '53.

Q. Do you recall that or are you just guessing?

A. No, I am not guessing, I'm telling.

Q. You're telling. You're telling because you recall it? A. Yes.

Q. All right. What do you recall reading about Cara Nome products?

A. Well I can't just exactly say because I don't memorize all those things, but they usually have a list of their products, Rexall products and Cara Nome products, but always down at the bottom of the page there is this big letter writing "Rexall Drug stands behind all its products," or something to that effect.

Q. And you relied on that, didn't you? [132]

A. Yes, I did.

Q. And is it because you relied upon what you read in those ads in the Farm Journal that Rexall

(Testimony of Mrs. John W. Nihill.)

Drug stands behind all its products, is that the reason that you took this guarantee home and stuck it up on the board at home? A. No.

Mr. Lanier: If the Court please, that's objected to as argumentative.

The Court: Sustained.

Mr. Bradish: That's all. Thank you very much.

Mr. Packard: Mr. Lanier, I have just a couple of short questions that may facilitate things.

Mr. Lanier: It's all right with me, counsel.

The Court: Well, proceed.

Recross Examination

Q. (By Mr. Packard): I just wanted to clear up one thing. I am not certain whether you testified to—but I don't recall— [133] whereabouts in your house did this cold wave begin?

A. We were in the dining-room by the dining-room table when we started to wind the pin curls up and we later had to move to the kitchen because the men wanted the dining-room table to play Whist on and that's where it was given.

Q. And Sandra never did complain about any stinging or burning sensation to her scalp or complain about the giving, did she, at any time?

A. No, she did not.

Q. And she never complained about any of the solution getting in her eyes? A. No.

Mr. Packard: That's all.

(Testimony of Mrs. John W. Nihill.)

Redirect Examination

Q. (By Mr. Lanier): Mrs. Nihill, I just have one thing I want to get squared away. On cross-examination, you were asked if at the time of your deposition in Jamestown, the following questions were asked you and you gave the following anskers. The questions being——

"Q. And where was this solution at the time?

A. Well, it was in the bottle. I guess that's where it was. Then she poured it into the [134] dish, or half of it rather. That is the way it is supposed to be.

Q. And then after that what was done next?

A. Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Those are the questions and answers that were asked you and you answered that if it's there I presume I did. Now, I want to ask you the immediate three questions preceding those which were asked you by counsel and ask you whether or not at the time of the giving of this deposition, in reading all of them, completely, together, these questions were asked and you gave these answers:

"Q. And what was done then, was it pinned up and then what?

A. Well, I just can't say for sure, but I think it was. She let it set for a little while, and then she put this neutralizer on it, or whatever, and that sit so long, and then she poured the rest of it over it.

(Testimony of Mrs. John W. Nihill.)

Q. Did you help in putting the stuff on the hair? A. No, I was the timer.

Q. And how did she put the solution on the hair first? A. With a piece of cotton. [135]

Q. And where was this solution at the time?

A. Well, it was in the bottle. I guess that's where it was. Then she poured it into the dish, or half of it rather. That is the way it is supposed to be.

Q. And then after that what was done next?

A. Well, then it was allowed to stand so long, and she went out to the sink and the rest of it was poured on over her head."

Now, is that the complete sequence, those questions and answers that you gave at that time?

A. I believe they must be if they are written down that way.

Mr. Lanier: Thank you.

The Court: Is that all, gentlemen? You may step down.

(Witness excused.)

The Court: The jury may be taken out and stand in recess for ten minutes.

(Thereupon, a ten-minute recess was taken and, thereafter, the following proceedings were had in open Court:)

Mr. Lanier: Please the Court, at this time I would like to call [136] Mr. Lewis back to the stand for cross-examination under the Rule.

Whereupon,

MR. ARNOLD L. LEWIS

having been previously sworn, resumes the witness stand for further cross examination, as follows:

Further Cross Examination

Q. (By Mr. Lanier): Mr. Lewis, on Tuesday, you told me you would make an effort to find Mr. Monteau, your ex-chemist's, address. Have you made that effort? A. Yes, I did.

Q. Did you find it? A. No, sir.

Mr. Lanier: That's all I have, your Honor.

(Witness is excused.)

Mr. Lanier: At this time, may it please the court, may I have the original deposition of Mrs. Donald Carlson first, and then Mrs. Carl Carlson.

(The Clerk furnished the deposition in question to counsel.)

Mr. Lanier: Counsel, would you be Mrs. Donald Carlson first please?

Turn to page 3, counsel. [137]

DEPOSITION OF MRS. DONALD CARLSON

(Thereupon, the testimony of the witness for the plaintiff, Mrs. Donald Carlson, given by deposition on August 1, 1957, in Jamestown, North Dakota, was read before the court and jury, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:)

Mr. Lanier: "Mrs. Donald Carlson, a witness called at the request of the plaintiff, being first

(Deposition of Mrs. Donald Carlson.)
duly sworn to testify to the truth, the whole truth, so help her God, thereupon testified as follows:

Direct Examination

Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota? A. Stutsman.

The Court: What is her name?

Mr. Rourke: Mrs. Donald Carlson. [138]

Q. And about how far are you from Kensal, North Dakota?

A. Oh, approximately, maybe forty miles, something, either way.

Q. Calling your attention to sometime in March of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?

Mr. Bradish: Just a minute. I'm going to object to the question. That question and all of the questions and answers that follows that, on the ground that they are not material, and there has been no foundation laid for any materiality between the visit of this witness to the Rexall Drug Store in March of 1955, and the issues presented by the pleadings in this case concerning a bottle of Cara Nome that was purchased in February of 1955. The deponent here is in no way a party to this

(Deposition of Mrs. Donald Carlson.)

action or, to my knowledge, any other action, and what this witness did in the drug-store in March 1955 is most certainly not material to the issues in this case.

Mr. Packard: I join in the objection, your Honor, on behalf of [139] the defendant Arnold L. Lewis.

Mr. Lanier: It couldn't possibly be anything at this point, but preliminary, your Honor.

The Court: Well the preliminary inquiry demonstrates pretty well the ultimate purpose, and I am inclined to think the objections are quite proper.

Mr. Lanier: Well, now, may it please the Court, I want to be heard at length on that objection.

The Court: Counsel will want to go in chambers I presume, out of the presence of the jury.

Mr. Lanier: Yes, sir.

The Court: We will retire to Chambers.

(Whereupon, the Court, counsel for the respective parties and the reporter retired to Chambers where the following proceedings were had out of the hearing of the jury:)

In Chambers

The Court: All right, Mr. Lanier. [140]

Mr. Lanier: May it please the Court, my position is this. You have here a legal inference. You have a small town—the foundation in the record goes to show that it is a small drug-store and the only drug-store in the city. That you have a small town of from three hundred to three hundred and

fifty people. You had a purchase made at approximately the same time, the purchase was made within thirty days, from that drug-store. Now, then, counsel is now objecting to the weight of the evidence, not to its admissibility. The jury has a right to be able to take the inference from all these circumstances that, if they purchased the same product, and had a result from which hair came out, which the depositions show, the jury has a right to take their inference as to whether or not there was something wrong with the product and, to deny the plaintiff to do that, to me would be clearly, under every decision of evidence——

The Court: Can you show that it's from the same lot, Mr. Lanier?

Mr. Lanier: It's impossible, your Honor, to show it from the same lot. It's utterly impossible, but it is the same product; it's manufactured by the same people, the [141] defendant Studio Cosmetics. It's distributed by the same Rexall. It's in the same area. For instance, Mr. Lewis has himself already testified in the record that Batch 181 for instance was put out in thousands of bottles. It was first put out to Chicago, and from there it has to go out in this area. It's totally untenable to presume that this little druggist in that short period of time could even be buying from another batch; that that batch comes in all at once. Now I ralize for awhile all their arguments as to its weight are there, but what counsel is doing now is objecting to weight, he is not objecting to admissibility, and to deny the jury the right for its

inference as to this product, to me would be prejudicial error.

Mr. Packard: May I be heard? I think I can clear this whole thing up, your Honor. On page 4, line 5, the question was asked the witness, in the deposition I'm reading of Mrs. Donald Carlson:

"Question—And did you make a purchase at the Kensal Rexall Drug Store of a Cara Nome Home Permanent wave set?

Answer—Yes, sir."

Now the evidence is clear that there are various types of Cara Nome home wave sets. This was a pin curl set [142] out of lot 181. I am not certain—I just don't recall what the evidence is at the present time, but Cara Nome puts out four different—three different—one of them is for natural curl, I think I made that in my opening statement; they put one out for a pin curl. This is a special type where they just put the pin curls. Then they have one for bleached hair and for dyed hair, tinted hair and so forth, and they use different strengths for the various types. They call one the mild, for people that have hair that tends to break off, or where they have had bleaches and tints. So this deposition—all they've established—she bought a permanent wave set and it doesn't pin it down to a pin curl, the same type of set that this young lady had, so, therefore, there's no proper foundation. Just that particular basis, that it wasn't the same type, not even shown it was the same lot.

Mr. Bradish: I think there is something a little

more important than that, although I think that is important.

Mr. Packard: And the contention under which—whether the directions were followed by this Mrs. Carlson—we would be trying three separate lawsuits here to see that the two Carlsons followed the directions, applied it exactly the same way that Sandra did, and had the same [143] results, and so forth. In order to show subsequent accidents or subsequent occurrences for certain limited purposes, it may be admitted, but you have to lay the foundation to show that the circumstances were substantially the same, and there is no foundation here to show the circumstances were substantially the same, from which the jury could draw any reasonable inference from any evidence which would be offered by way of these depositions, and upon those grounds we strenuously object to the introduction of these depositions because it would permit this jury to guess and speculate.

The Court: Do you want to say anything?

Mr. Bradish: I wanted to say basically that, your Honor. We don't know in what manner these two ladies applied the particular wave set that they bought. We don't know which type of wave set it is. We don't know whether they followed the directions or whether they didn't follow the directions, and I think the Court will take judicial notice that with these wave sets, if you don't follow the directions, you might have some bad results. Again, counsel in his opening statement, referred to the results that these ladies [144] had, which were

obviously and admittedly different than the results that this little girl claims to have had. These ladies had their hair to split off and they had it trimmed and then it grew out, and it was perfectly all right. In the case at bar, there is a claim that the wave solution used by this little Sandra Nihill caused her to lose her hair and caused her to have a permanent condition now of baldness or partial baldness. There is just no connection. If this sort of thing were permitted, counsel would be permitted to go all over the country and find anybody who claimed they had a bad result from Cara Nome wave set and put them on and I think a good analogy is our rule of law, and I would assume it's the rule of evidence in your Honor's jurisdiction, that in cases of subsequent acts and repairs, they are not admissible to establish prior negligence and the condition of subsequent batches of this solution, if they could establish that they were of the same component parts, as the solution in question, would not be admissible to show that that batch in question was bad. There is just no foundation for this evidence and I am equally as convinced as Mr. Lanier appears to be that the admission of this evidence in a lawsuit of this type would be clearly prejudicial error. I can't see how [145] he can sincerely contend that it is admissible. I don't know what legal inference he says the jury is entitled to draw unless it seeks inference that the bottle that these ladies bought in March was from the same batch that they bottle that little Sandra bought, but I don't think that that makes any difference. Even

if he could prove that it was from the same batch —he can't and hasn't—but if he could prove it was from the same batch, I still don't think that the results that these ladies claim to have had from that wave solution would be admissible in trying to establish that the whole batch was bad.

Mr. Lanier: Now, may it please the Court, in answer to that—let's do them one at a time. First of all, counsel tries to make an analogy between this situation and that of subsequent repairs, to which of course there is no analogy. Subsequent repairs are of course outlawed and thrown out on the grounds that they can not serve as admissions. Again, they are arguing the weight. Of course, that's the ground upon which they go out. Now, as to counsel's first statement, which I don't think, again, it would make a bit of difference as to what kind, whether it was a pin curl or regular. You're depending upon the name, you're depending upon the advertising and the warranty and the guarantee that goes with it. Now, if the product itself is [146] bad and has the same type of results of losing hair, that—and for its weight—is entitled to go to the jury; but that isn't the point at all because if the Court would go further in the deposition, for instance on page 7, of Mrs. Carl Carlson, you will find out that it was the same.

"Q. Now, would you tell the jury what was the condition of your hair, and when, after the application of the Cara Nome Rexall home wave?

A. You mean when I took the bobby pins out?

Q. Yes.

A. Well, your bobby pins were all rusty, and your hair, if you are going to comb them out—and so forth."

Now, therefore, of course, we have a pin curl wave. There can't be any question about that. It's their pin curl wave——

Mr. Bradish: I don't recall any evidence that only a pin curl has the bobby pins.

Mr. Lanier: Well that, of course, would be easy to get. If we are going to go into all of that and that's something, between counsel, that we all know——

Mr. Packard: I don't know. [147]

Mr. Lanier: Well, we can put the proof on on that, if that's all that's necessary.

Mr. Packard: I think that's one of the things, but I think there's more important things than that. I'm sorry to interrupt you, Mr. Lanier.

Mr. Lanier: Now, next, when they are talking about whether or not directions were followed. Both of them were asked questions such as this—

"Question: And do you know whether or not you meticulously followed the rules that were laid out for the timing in the directions?

Answer: Yes, we did follow that correctly."

Now, they had a lawyer at this deposition. He has cross examined. He had a perfect right to go into that. The argument that we are trying two lawsuits is almost amazing, your Honor, because that's why they have notice—that's why they have a lawyer there. He has a full right to examine on to how they were used and if they followed them

and if they were acquainted with them and so forth. There just isn't any weight to it at all. [148]

Mr. Bradish: Where are you reading from?

Mr. Lanier: That was on page 6, as it happens, of Mrs. Carl Carlson. It's in both of them.

Mr. Rourke: There is cross examination on this.

Mr. Lanier: And of course there is cross examination on it, on how they followed the rule. To me, your Honor, it's elemental. As a matter of fact, it's so elemental that I didn't even bring cases on it, because here you have a product purchased at the same time of the same trade-name and apparently of the same thing. And you have the same harmful results. The degree of the result may be entirely different, but it is certainly admitted for whatever it is worth. The objection goes entirely away.

Mr. Packard: Objections are reserved until time of trial in a stipulation. I call the Court's attention to that.

Mr. Lanier: But, of course, the Court I'm sure is well aware that there are only very very few objections that can be made and that only goes to materiality. I'm not questioning your right to object to this, or whether [149] objections are reserved or not. It only goes to the materiality of the proof itself whether it's admissible or not admissible——

Mr. Packard: It goes to each question. If the question isn't properly framed, other than—it's a foundation for the taking or reading or using the deposition. That was the only thing that was waived,

and I take it the usual stipulation, all objections are reserved at the time of trial except as to the form of the question.

Mr. Bradish: This objection, at least insofar as the Rexall Drug Store is concerned, is directed at the admissibility of the evidence, and certainly not as to any weight.

Mr. Lanier: Counsel, I don't question your right —so we understand each other—on this particular objection, at this time, to make this objection at this time, I don't question this.

Mr. Packard: I don't know whether our objection has been stated in the record or not, but we object upon the ground there is no proper foundation laid for the reading of this deposition or taking of the testimony in this deposition. [150] Further upon the grounds it's immaterial, irrelevant and incompetent and doesn't tend to prove any of the issues.

The Court: I'm inclined to—Mr. Lanier seems to be so very confident of his right here—personally I think it would be a reversible error to let them in, but if it is improper Mr. Lanier, I'm——

Mr. Lanier: If it was for that reason, your Honor, I wouldn't want it in. I wouldn't be in a position, in the present condition of the case, I wouldn't be putting myself——

The Court: In these matters, it's never very wise to rely upon the elemental nature of a question of that sort unless it's important. If you insist on reading it, Mr. Lanier, I'll let you read it.

Mr. Lanier: Well, I would like to read it, your Honor.

Mr. Bradish: Did I understand it, was it your Honor's expression that you felt that the admission of this testimony would be reversible error?

The Court: I said if I was in error about it, it would be reversible error, in permitting it to go in.

Mr. Bradish: I think just so that—since I am accused of inviting error, I think that I should say, for the record, and this most certainly is not in the form of any threat, but I think I should say for the record that in the event of an adverse verdict, insofar as my client is concerned, I fully intend to take an appeal.

The Court: Well, there's no doubt of that. Now, then——

Mr. Lanier: Also, your Honor, because of the Court's feeling on it, and prior to going with this, while, as far as that's concerned, I have every confidence in it, and I do understand the feeling of the court—and if I did not have confidence in it, I certainly would not want the record to be prejudiced at this time, however, I think possibly, also, I think that I should perhaps do one more thing by way of foundation, which I can do very quickly which, at this time, I think when we go out I'll make my record and withdraw this witness at the time and do that, then perhaps the Court may feel a little bit better also about it.

The Court: Well I don't think so; but you——

Mr. Bradish: Your Honor, may I suggest [152] one more thing—we're here, the lady is here with

her pencil and her machine. If counsel is going to proceed to read these depositions, there are going to be other objections as to questions calling for the conclusion of the witness. Could we possibly go through them now and make those objections now so that we don't have to be in a position of jumping up and down and up and down in the courtroom——

Mr. Lanier: I have no objection.

Mr. Packard: I object to each and every question. Maybe we can have a stipulation that the objections we've stated go to the reading of the deposition and each and every question. I don't like to jump up and object anymore than I have to, but I do want to protect my record.

The Court: Mr. Bradish has some special objection.

Mr. Bradish: Yes, there are additional objections other than the materiality as to certain questions in here. They are based on materiality and also an additional ground—I was specifically thinking of this one here, a question on page 6—— [153]

Mr. Lanier: Which one are you on, counsel?

Mr. Bradish: On Mrs. Donald Carlson, page 6, let's start over at—I think if your Honor reads this deposition you will see that objections are made to practically every question in them by the attorney present. Question on line 1—

"Question: All right. Now, will you tell me whether or not you followed those directions?

Objection.

Answer: Yes.

Question: Did you follow the directions meticulously and carefully?

Answer: Yes.

That's objected to.

Mr. Lanier: No, it's not objected to.

Mr. Packard: "Just a moment," he says, "We object. No proper foundation." Apparently the objection came after the answer.

Mr. Lanier: There is no motion to strike.

Mr. Packard: Well, anyway we still have that right. [154]

The Court: Those plainly are asking for conclusions of the witness. Unless he follows it up by asking her to tell what she did.

Mr. Packard: That's the point.

Mr. Bradish: Then in the very next question—

"Question: Now, thereafter will you tell me the result of that permanent wave to your hair?"

Again, I'd have to object to that as being her conclusion as to what the result was. I might say "Ask her what happened to her hair."

Mr. Lanier: One moment. Now, where are you now?

Mr. Bradish: I'm still on page 6.

Mr. Lanier: Now, your Honor, before we get into these, so that there won't be any question which will come up repeatedly as these are going on, the form of the question is entirely waived at the time of taking of the deposition, the reason for it, of course, is clear——

Mr. Bradish: It doesn't say so. [155]

Mr. Lanier: I don't care what it says. The Fed-

eral Rules require it. The reason for it, of course, is clear. That one can not have a deposition taken and, at a later date, when, if an objection had been made to the form of the question, and lets the form go in, so that had the objection come in, the question could have been reframed, it's universally, of course, held in the Federal Practice, that those objections to the form of that question are out. Now, for instance, when you come in with an objection for a conclusion, after a deposition is taken, that objection is not good and valid to a deposition at this time. Materiality objections of course are good at this time. No foundation. They can still object to it at this time. But as to questions —leading questions—which is exactly in the form of a conclusion. Now, when counsel comes to the question here, "Now, therefore, will you tell me the result of that permanent wave to your hair?", if there is an objection to that, and the form of that question, it can only be that it is calling for a conclusion of the witness. There is no such objection by Mr. Jungroth there. He is objecting to relevancy and the proper foundation. [156]

Mr. Bradish: Mr. Lanier, would you turn to page 2 of Mrs. Donald Carlson's deposition, and this is you talking:

"Now, for the record, may it show that the deposition of this witness is taken pursuant to stipulation by and between all of the attorneys for the plaintiff and the defendants, without further notice;

That it is further stipulated that the witness may

be sworn in by P. W. Lanier, Jr. of Fargo, North Dakota, a notary public in and for the State of North Dakota, and that the respective counsel waive any necessity for any further certification in the deposition or record for administering of the oath;

May it further be stipulated that all the parties hereto, by and through their respective counsel, waive the necessity of the reading or signing of the deposition by the witness, and that the same may be used by either party at the trial, subject to any objections that may be made at that time not going to the foundation for the taking and reading and using of the deposition, is that all right?

Mr. Jungroth: We so stipulate."

Mr. Lanier: Subject to any objections that may be taken at that time. [157]

Mr. Packard: All right, we're taking objection.

Mr. Lanier: Under your Federal Rules you may not take those objections which go to the form of the question. The reason for it is very simple——

The Court: I don't agree with Mr. Lanier. I think that, under that stipulation, you have a right to make any objection that goes to the propriety of the question and answer with reference to the form as well as to foundation. I think that just adds fuel to the fire that you get by going into this whole thing at all. As I think about that, there are so many elements that enter into the making out of a case, and the defense as to the particular case. For example, one of the defenses that they have here, which is a very logical defense, whether

they've done anything or will do anything towards establishing or not is beside the point, and that is a systemic condition or an allergy or anything of that sort might well effect the result of using the substance of this particular pin curl solution. As I think about it, Mr. Lanier, I'm going to reverse myself and not let you read it at all. [158]

Mr. Lanier: All right, at this time, may it please the Court, may I make an offer of proof?

The Court: Yes, you may do that.

Mr. Lanier: Now comes the plaintiff and offers proof by the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, taken at Jamestown, North Dakota, August 1, 1957, and offers to read said depositions and both of them into the record and that said both depositions be made a part of the record herein for the purpose of this offer of proof.

Mr. Packard: To which there's objection to the offer of the depositions on behalf of the defendant, Arnold L. Lewis.

Mr. Bradish: And the defendant Rexall.

The Court: Which objections have heretofore been stated by respective counsel and those objections are sustained and the offer is denied.

Mr. Bradish: Now, counsel, just one more thing, do you have anything else, or do you plan to rest?

Mr. Lanier: No, I'm going to put on—when we go in I'll offer some more foundation. [159]

Mr. Bradish: Oh, I see. Well, your Honor, that's why I asked the question. I thought if he was through now, I would suggest possibly the jury could be sent home because we have some motions

to make before your Honor that I imagine will take possibly the better part of an hour or so. If you're going to finish tonight, then maybe we can make them the first thing in the morning.

The Court: How long will your witnesses take, do you have any notion?

Mr. Packard: Well, I imagine it will take—I have a doctor—I imagine a full day anyway, probably a day and a half.

The Court: Probably have to run over the week-end?

Mr. Packard: Oh, yes, yes.

The Court: You want to get through with your witnesses tonight?

Mr. Lanier: I will get through this afternoon, I'm almost sure of that.

Mr. Packard: I would suggest, if it meets with your Honor's approval, [160] that perhaps the jury not return until eleven o'clock in the morning and the lawyers can get here at ten and we can make our Motions before your Honor at that time.

(Whereupon, the Court, counsel for the respective parties and the reporter returned into the courtroom where the following proceedings were had in open court:)

Mr. Lanier: Please the Court, at this time I would like to call Mr. Lewis back to the stand again.

Whereupon,

ARNOLD L. LEWIS

resumed the witness stand, for further cross examination, as follows:

(Testimony of Arnold L. Lewis.)

Further Cross Examination

Q. (By Mr. Lanier): Mr. Lewis, there is no question but that the batch tested for the purpose of this lawsuit, and conceded by all of us, is batch 181? Is that correct?

Mr. Packard: Well, I object to the form of the question—"the batch tested for this lawsuit." I expect to have evidence of maybe other batches and so forth. I think if he frames the question that batch 181 was tested, I have no objection to that, but I mean it assumes facts not in evidence. [161]

Mr. Lanier: If the Court please, I'm going by the opening statement of counsel when he told this jury that this was a purchase from batch 181.

The Court: Is there any question about that?

Mr. Packard: No, you told me that.

Mr. Lanier: I'm going by your statement to the jury, counsel.

The Court: All right, then, there's no dispute about it. Proceed.

Q. (Mr. Lanier, resuming): Is Batch 181 the batch you and I are speaking of in this lawsuit of Cara Nome Pin Curl Permanent?

A. It is now, yes.

Q. All right.

Mr. Lanier: That's all, your Honor.

(Witness excused.)

Mr. Lanier: Mrs. Nihill would you please take the stand again?

Whereupon,

MRS. JOHN NIHILL

resumed the witness stand for redirect examination, as follows: [162]

Redirect Examination

Mr. Lanier: At this time, I want Plaintiff's "F" marked for identification.

Clerk: Plaintiff's Exhibit 34 marked for identification.

(Thereupon, Plaintiff's Exhibit No. 34 is marked for identification.)

Q. (By Mr. Lanier): Mrs. Nihill, I show you Plaintiff's Exhibit 34. Will you tell me when you went back into Kensal at the Rexall Drug Store and purchased that exhibit?

Mr. Bradish: That's objected to as being leading and suggesting and assuming facts not in evidence.

Q. Did you go back to Rexall Drug Store at the insistence of Mr. Roney, your lawyer at Carrington, and make another purchase?

Mr. Bradish: That's objected to on the grounds it's leading and suggesting.

The Court: She may answer.

A. I did.

Q. And when did you do that?

A. I just can't say to the date, but it was after [163] Sandra lost her hair.

Q. And as you stated in your previous testimony, that was around the first part of June?

A. Yes, I believe that's right.

(Testimony of Mrs. John Nihill.)

Q. And is this the kit that you purchased?

A. Well, that looks like it, yes I believe it is.

Q. Would you open the kit and take the solution bottle out of it?

(The witness opened the kit and took the solution bottle out.)

Q. Now, would you look at that and tell me what the number, the little red number, in the corner of it, is? A. 181.

Q. Thank you. Put it back in the kit please.

The Court: And when did you purchase it?

Mr. Lanier: About the first of June, your Honor.

The Court: I'm asking the witness. When did you purchase it?

The Witness: About the first of June.

Mr. Lanier: The year on that also? The first of June of what year?

The Witness: It would be 1955. [164]

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit No. 34.

Mr. Packard: I have no objection.

The Court: Exhibit 34 will be received.

(Whereupon, Plaintiff's Exhibit No. 34, previously marked for identification, Plaintiff's Exhibit No. 34, was received in evidence and made a part of this record.)

Mr. Lanier: Now, the little bottle which has been marked but which has never been offered.

(The Clerk furnished the article counsel requested.)

(Testimony of Mrs. John Nihill.)

Q. (Mr. Lanier, resuming): Now, Mrs. Nihill, I show you Plaintiff's Exhibit No. 5, which you have previously, to save time, testified to as the bottle that you used to give the permanent to Sandra Mae and you testified that you put it in the garbage can or the trash can, and you testified that after seeing your lawyer in Carrington, that you retrieved it. Is that the bottle or not that you gave me?

A. Yes, it looks like it, yes. [165]

Mr. Lanier: At this time, may it please the Court, I offer into evidence Plaintiff's Exhibit 5.

Mr. Packard: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 5, previously marked for identification was received in evidence and made a part of this record.)

Mr. Lanier: I call the attention of the Court, that Exhibit 5 now in evidence, the one used, is 181.

Your witness.

Recross Examination

Q. (By Mr. Bradish): When you went back to —I assume you went back to Olig's drug store to get this second kit,—in June, around June, didn't you? The one counsel just showed you here?

A. Yes.

Q. Plaintiff's Exhibit No. 34? A. Yes.

Q. That was after you first saw your lawyer in June? A. Yes. [166]

Q. And you got that at the same drug store where you got the original one. Is that right?

(Testimony of Mrs. John Nihill.)

A. I bought that at the same drug store.

Q. Did you talk to Mr. Olig when you went there in June to buy this particular package?

A. He knew I was buying it, yes.

Q. Did you tell him that you were going to file a lawsuit at that time?

Mr. Lanier: Objected to as totally immaterial and argumentative, your Honor.

The Court: The question was, did you talk to Mr. Olig when you were there?

The Witness: Yes.

The Court: Proceed.

Q. (Mr. Bradish, resuming): And you had previously testified, that you told Mr. Olig sometime after the application of this cold wave solution, that Sandra's hair was coming out. Is that right?

A. Yes, sir.

Q. When you went there in June to get this second bottle, did you tell Mr. Olig that you were going to sue somebody about this? [167]

Mr. Lanier: Objected to as argumentative and immaterial.

The Court: She may answer. Did you tell him that?

The Witness: I don't remember whether I did or not.

Mr. Bradish: That's all.

Mr. Packard: I don't have any questions, your Honor.

Mr. Lanier: That is all.

(Witness excused.)

Mr. Lanier: At this time, may it please the Court, may I call Mrs. Carlson back to the stand again? The original deposition.

The Court: You may call him back.

(Mr. Rourke took the witness stand to read the answers.)

Mr. Lanier: Would you take the deposition of Mrs. Donald Carlson please.

Thereupon,

DEPOSITION OF MRS. DONALD CARLSON

a witness for the plaintiff, taken in Jamestown, North Dakota, August 1, 1957, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows: [168]

"Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota? A. Stutsman.

Q. And about how far are you from Kensal, North Dakota?

A. Oh, approximately, maybe forty miles, something, either way.

Q. Calling your attention to sometime in March of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?"

Mr. Bradish: Just a minute. Again, I'm going

(Deposition of Mrs. Donald Carlson.)

to have to object to the reading of this deposition, or any portion of it, from that point on to the end on the same grounds that we heretofore urged before your Honor as our objections to the reading of this deposition, namely that it is completely immaterial to the issues claimed [169] by the pleadings in this lawsuit. There has been no foundation laid for the reading of this deposition.

Mr. Packard: Let the record show that defendant, Arnold L. Lewis, doing business as Studio Cosmetics joins in this objection made by Mr. Bradish on behalf of Rexall.

Mr. Lanier: If the Court please, my position on that at this time, any objections that counsel had prior to that, we have now shown that 181 was purchased February 5th from this little drug store, 1955. We have also now shown by Exhibit 34 that it was purchased June of 1955 and it is also from batch 181. The offer we are making now, from the same little drug store, is one purchased in between that time and that therefore it is also the inference that it is 181.

Mr. Packard: I object, your Honor, upon the ground there is no foundation in the deposition to bear out any of the statements of counsel as to that foundation. Further upon the other grounds which we have stated in chambers and which are on the record, are our grounds for objection. But that statement he has just made, I further object there is no foundation to show that to be a fact.

The Court: For reasons stated in conference in

(Deposition of Mrs. Donald Carlson.)

chambers and made a part of the record, I'll sustain the objection to the offer.

Mr. Lanier: All right. Now, your Honor, may the record show that at this time I renew my offer of both the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson for all the purposes as heretofore made?

The Court: It may so show and show the offer denied.

Mr. Lanier: Thank you, your Honor.

At this time, the plaintiff rests. One moment, your Honor, may I withdraw that rest please and approach the bench?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench and the following proceedings were had out of the hearing of the jury:)

Mr. Lanier: May the record show that it is agreed that the instructions may include the Mortality Table for a thirteen-year-old [171] as found in Corpus Juris Secundum?

Mr. Packard: Counsel, I won't agree to that. I will agree to the fact that if they become material, and if the Court deems it advisable to instruct on them, then the Court may take judicial notice and instruct accordingly.

The Court: Is that the rule in California?

Mr. Bradish: That's the rule in California.

Mr. Lanier: That's satisfactory with me if that's so.

The Court: All right.

(Whereupon, counsel for the respective parties and the reporter returned to their respective places and, thereafter, the following proceedings were had in open court:)

Mr. Lanier: With that in mind, your Honor, the plaintiff rests.

The Court: Ladies and gentlemen of the jury, it was suggested in chambers that if this very situation arose at this time that there would be some motions that would take [172] some time. It seems impracticable at the time to hold the jury until those motions have been completed without running up to the adjournment hour pretty close, and for that reason you may go at this time and be back at eleven o'clock tomorrow morning. That will give me time to dispose of such motions as counsel may have. You may withdraw at this time under the same injunction heretofore, not to talk about the case, or permit anyone to talk to you about it. You may pass.

(Whereupon, the hearing in the above entitled matter was adjourned until eleven o'clock a.m., April 11, 1958.) [173]

Be It Remembered, that a further hearing was had in the above entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State

of California, on April 11, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, Court convened in Chambers at 10:00 o'clock a.m., on said date and the following proceedings were had out of the hearing of the Jury:

The Court: Mr. Lanier has brought some authorities in to demonstrate [174] that I was wrong in ruling out his depositions, and I think he plans to re-offer. And if he does, I think the re-offer ought to be made before these motions are heard, as part of his main case.

Mr. Bradish: Well, may we be permitted to see the authorities?

The Court: You can be permitted to do anything you want to do.

Mr. Lanier: I can give you one of the cases on it, although they are voluminous. One is just about as much in point as any you will need. Carter vs. Yardley & Company, Ltd.. 64 NE (2nd) 693; Wigmore on Evidence, 457.

Mr. Packard: What does it say?

The Court: Both of those authorities are over there on the desk.

Mr. Packard: Well maybe, before we take the Court's time—I mean are you considering——

The Court: I just wanted to give that warning that he proposed to do that. I didn't want you to be taken by surprise later, because he is closed and he wants to reopen—— [175]

Mr. Packard: I think that it's within the Court's

discretion to permit him to reopen at this time and make any further offer if he wishes to, and I'm certainly not going to object to him reopening to make further offer and try to——

The Court: I thought you would object if he waited until after you made your motions and started on your own case, you would object later. If I know lawyers, I think I know them that well.

Mr. Lanier: May the record show at this time that I move the Court to reopen for the purpose of reoffering the Mrs. Carl Carlson and Mrs. Donald Carlson depositions, which depositions have been offered twice heretofore, and because of the fact that the jury isn't coming in until eleven o'clock, if counsel will stipulate that, we can go ahead with the motions, I am perfectly willing to do that. We will save time.

Mr. Bradish: Might I suggest, that we have no objection to your Honor granting the motion to reopen.

The Court: The motion will be granted to reopen for the purpose of [176] reoffering the depositions mentioned.

Mr. Bradish: Perhaps he can make his offer now and then we can see what your Honor intends to do with it, and if your Honor is going to deny it again, why we won't need to worry about making motions out of order. If your Honor intends to grant it, why then we can consider whether or not we want to wait and make our motions until after that testimony is read.

The Court: Yes.

Mr. Lanier: All right. Then, for the record, at this time I will again offer to read to the jury the depositions of Mrs. Don Carlson and Mrs. Carl Carlson.

Mr. Packard: To which we object upon the grounds heretofore stated at the time they were offered yesterday and, at this time the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, objects upon the same grounds heretofore stated, that there has been no proper foundation laid for the use of the depositions——

The Court: I don't know what you mean by that Mr. Packard. [177]

Mr. Packard: Well, the foundation—he has not in the depositions shown the manner in which these parties applied the solution. First, he has a conclusion in there that they followed all the directions, which we have urged and which we have discussed heretofore that that's a conclusion on their part, that they have followed all these instructions; secondly, he has not laid the foundation to show that the product they used on their hair was the same product upon which plaintiff is claiming her injuries, and I——

The Court: He showed it was a pin curl.

Mr. Packard: No, he hasn't, your Honor.

Mr. Lanier: The depositions refer to pin curls, your Honor.

Mr. Packard: Well, now, I take issue with that, and I submit to the Court that it does not and, on the contrary, it shows that they bought a cold wave permanent kit and the evidence will clearly

show in this case that my client puts out at least three kits that I know of, and that those kits each contain different concentrations of chemicals; that further the evidence in this case, and the reading of the deposition shows that the plaintiff sustained an entirely different type of injury than sustained by the plaintiffs in the depositions. Now, counsel has called our attention this morning—the first time I have seen [178] the case—I won't say it's the first time I have seen the case, because I actually remember reading the Carter case about five years ago when I was going back to Boston to take some depositions. It was probably the last time I read a Massachusetts case, but I am familiar with the case. That's the one where the women put perfume upon their skin. Now, there's an altogether different situation involved when a person puts something directly in contact with their skin than when they follow a procedure of using neutralizers, and they use solutions, and they permit certain time intervals to elapse and so forth, and apparently in the Carter-Yardley case, which is a Massachusetts case—a 1946 case—it was where they used a perfume and they held that the damage was caused by some harmful ingredient. In other words, the damages could be inferred that it was caused by some harmful ingredient other than peculiar susceptibility, and I may state to the Court that Massachusetts follows the minority rule on the question of allergies, susceptibilities and systemic conditions, and it stands out alone in all forty-eight states on the theory of allergy. California follows the rule

that a manufacturer is not responsible for injuries sustained as a result of a systemic condition or an allergy or reaction to a product. And Massachusetts is the only state that I [179] know of that follows the minority rule—and maybe one or two others—where they hold that you have to call attention to allergies and so forth in your product. And a leading case has been cited in my memorandum of points and authorities, Zager vs. F. W. Woolworth, where this woman put on some cream to remove freckles from her arms and she had an allergy or reaction to it, and I can cite the Court many authorities—and that's the majority rule in the United States—that a manufacturer is not responsible. A small percentage of people will have a reaction or allergy to some type of product he puts on the market, but the law in this state is to the effect that under normal uses the average person would receive, or a large portion of people would receive, a reaction to this particular product, and I submit to the Court that this case is not authority for the use of the deposition inasmuch as the language stated there is the minority rule for one thing; secondly, they have not laid a proper foundation in this case to show that the same product was used. There is no question they had the same product here in this Carter case. In Massachusetts, they had this perfume, so that they——

Mr. Lanier: Of which they make eighty.

Mr. Packard: What? [180]

Mr. Lanier: Of which they make eighty kinds.

Mr. Packard: Of what?

Mr. Lanier: Perfume.

Mr. Packard: It doesn't say eighty kinds of perfume.

Mr. Lanier: All right, do they tie it down to a particular thing, particular type of perfume?—no they don't. It's the Yardley Company—it's the Cara Nome Company. It's not only that one case. When we're discussing evidence, you do not have any minority rule on evidence there. Take your Wigmore. It's fundamental evidence——

Mr. Packard: What's fundamental?

Mr. Lanier: I can show——

Mr. Packard: Here is the testimony, listen to this, your Honor——

The Court: Get your Wigmore and let's see the language that you rely on. [181]

Mr. Packard: Your Honor, let me just show you now what this case states right here. I just started reading the case. I just picked up the foot notes,—

"Over the exception of the defendant, the plaintiff was permitted to introduce evidence of two lay witnesses and one admittedly qualified expert physician, to the effect that each of them had applied to his or her own skin perfume from the same bottle, and that it irritated and inflammed and injured the skin."

I think that answers the problem right there, that they took and applied "from the same bottle" the exact perfume and it irritated the skin. Now there's your foundation, it was the same bottle.

The Court: Are you going to give me the language from Wigmore?

Mr. Lanier: Yes. Take, for instance, in Upton vs. Harris, a federal case — injured from broken glass in a Coca-Cola bottle. "The finding of foreign substances by other persons in other such bottles prepared by the defendant admitted." The cases, your Honor, are just voluminous. You don't have to go to that particular bottle to find out——

Mr. Packard: That's what the case you cited says, that they took it from exactly the same bottle and they applied it to their skin. [182]

Mr. Lanier: It doesn't change the principle.

Mr. Rourke: The only issue is relevancy, and it's of course more relevant if from the same bottle.

Mr. Packard: Well I'm objecting there is no foundation here, among other things.

Mr. Bradish: I might suggest that the broken glass in the Coca-Cola bottle is not the situation we have here. Here we have a chemical product which, to be properly used, must be used according to directions, and I think everybody will admit that a chemical product such as this, if not used according to directions will have some bad results, but there is no directions for the use of the bottle of Coca-Cola, so you can assume that one who drinks Coca-Cola, all they have to do is open it and drink it. My objection on the lack of foundation is that there is no foundation here as to the step-by-step directions that the deponent either followed or failed to follow.

Mr. Rourke: That's all set forth in the depositions.

Mr. Packard: There's one further thing, I think your Honor, that is the [183] fact of these two depositions, we don't know the condition of these women's hair before they had this cold wave, they may have had bleached hair, tinted hair, we don't know whether they took a test curl—and those all go to foundation——

Mr. Lanier: Counsel, how can you make that contention when you have a lawyer there cross examining on every bit of that?

Mr. Packard: We don't have to lay the foundation. If he wants to use the testimony, the burden is upon the plaintiff, or the parties offering evidence, to lay the foundation for his own evidence. He can't say you didn't cross examine and lay the foundation for us—it's ridiculous.

Mr. Lanier: Counsel, you are presuming—first of all, when a person states "I used 'X' product, I read the directions, I followed every direction in there," that is not a conclusion. That is a statement of what they, themselves, did. Now that is subject to any cross examination you want, into details of how they did it. But when we come to the point that a person can't say that "I read that sentence, I read those directions, and I followed them," if that is a conclusion, then we are going to have to revise the whole rules of evidence. [184] It's only subject to cross examination——

The Court: Mr. Lanier, I sat here and pondered over the thing. I think it's a little doubtful whether

you are entitled to have those in or not. It's your case and you are insisting very strongly, and I would hate to deprive your client of a right that would result in her receiving injustice in this court. Upon your insistence, I am going to admit those depositions. That was my original ruling and I was so doubtful about it that I excluded them, and now upon your authorities and upon your insistence I am permitting them to go in and permitting you to read them. Now, then, considering those depositions read, can we go ahead with the motions?

Mr. Packard: Certainly. I think we can proceed, assuming for the purpose of our motion and assuming for the record that plaintiff has read the depositions of both the Mrs. Carlsons, I forgot their —Don Carlson and so forth——

The Court: Two women, wasn't it?

Mr. Lanier: Two women, yes.

Mr. Packard: (Continuing) ——and stipulating that they have been read into the record and, thereafter, the plaintiffs have rested, and that at this time the defendants [185] are in a position to make any motions which may be made after——

The Court: Well, now, to avoid the possibility of future trouble, I had the Clerk bring the exhibits in, and I went over them because I never had seen them myself, and I note that stack of advertising, while it was marked for identification, it was never offered in evidence. I didn't know whether you overlooked that or not.

Mr. Lanier: Your Honor, I believe that each one

of those were offered. I believe that the record of the reporter will show that they were offered.

The Court: No, they were not. I noticed that in particularly, and the Clerk——

Mr. Lanier: And that the advertising was not offered in evidence?

The Court: Not a single piece of it except 7 and 28.

Mr. Lanier: Well, it's certainly an error on my part, your Honor. I certainly thought that I offered them, and I will request on the reopen to offer them. [186]

Mr. Bradish: I will have an objection to those.

Mr. Lanier: If they are not in, I certainly intended to offer them.

Mr. Bradish: I will object to them and I can probably urge my objection now, if your Honor would like, if you care to offer them.

Mr. Lanier: What are those numbers?

The Clerk: In evidence, or——

Mr. Lanier: I mean the advertising sheets?

The Clerk: Oh, 8 through 25.

Mr. Lanier: 8 through 25. At this time, may the record show that I offer into evidence, upon the proof now in the record, Exhibits 8 through 25.

Mr. Bradish: Well, I'm going to object to it on the ground that there's no foundation laid that the records, or the documents here sought to be offered, were ever seen or read by any of the plaintiffs in this matter prior to the purchase of the solution which gave rise to this particular cause of action. [187] These happen to be mats of Na-

tional Advertising that was conducted in the years 1953 and 1954 throughout the United States in various periodicals, but we haven't any evidence before the Court that this lady ever read any of the ads appearing in these documents prior to her purchase of this commodity. Her testimony, as I recall it, was that she thinks she saw some ads about Rexall and the Cara Nome products in the Farm Journal, but she didn't remember which year it was, '53 or '54, and also didn't remember when the Farm Journal was published and also she remembered nothing about what she read other than she saw the product Cara Nome in a list of the products that they put out, and the additional statement that she saw in the ads that Rexall stands behind their products. Well, I certainly feel that the statement "Rexall stands behind their products" is a long way short of being any express warranty——

The Court: That's on the basis of double your money back.

Mr. Bradish: Pardon?

The Court: That's on the basis of double your money back.

Mr. Bradish: That's right. The best evidence of what she read of [188] course would be the articles themselves, and we haven't had any copies of any articles that she read in any magazine prior to the purchase of this cold wave solution.

Mr. Lanier: In answer to that, your Honor——

Mr. Packard: I join in the motion, your Honor, inasmuch as I believe there has been no foundation,

likewise, for this testimony. As your Honor remembers, I think the first day I made a great amount of objections and so forth. I feel that the proper way for the plaintiff to have said "Well, I read it in such and such a magazine," and then tie in with the defendants that they published it, and they were responsible for the dissemination of that particular ad, and that particular article, but she has not tied in any particular article which she read which she relied upon. All they did is they subpoenaed all these records in as a fishing expedition and looked through them and saw where they put them out and she says "Oh, yes, I read some of those some place at one time; I don't remember what I read and where I read it, but I read it during the year '53 or '54,"—and I submit there's no proper foundation for the evidence.

Mr. Lanier: In answer to that, please the Court, first of all, without [189] anything further, the exhibits are all produced by the defendant; they are conceded to be mats and proofs of the ads that they ran in national periodicals in '53 and '54, immediately preceding the instant case. If, for no other purpose, they are admissible to show the extent of their advertising; secondly, there is no necessity to show that the plaintiff saw any particular ad in any given magazine. She doesn't have to bring "a" magazine that she saw. The mere fact that she picked it up on a bus or a train, and has no idea what it is, if she saw it and if she relied on it. They concede that they advertised in the Farm Journal during the same period of time. She takes and sub-

scribes to Farm Journal. She knows and has testified that she has read the Farm Journal. She testified to almost identically, even the wording that appears on the bottom of all of these ads. Everyone of the ads, as the ads will show, that "Rexall stands behind their products," appears on the bottom of their ad——

The Court: Do you contend that it is a Cara Nome representation?

Mr. Lanier: Yes, your Honor.

The Court: By Cara Nome?

Mr. Lanier: By Cara Nome and Rexall. [190]

The Court: What is your theory there? It's Rexall that puts out the ads, isn't it?

Mr. Lanier: And Cara Nome is their product, your Honor. It's Rexall Cara Nome.

Mr. Bradish: It's conceded directly to the contrary in the pretrial statement. The only admitted facts in the pretrial statement are that Rexall is the distributor of this product, has nothing to do with its manufacture and has nothing to do with its testing or its component parts; it buys from the manufacturer in a sealed package and sells through its distributing agencies, through these various independent drug stores. Now, if your Honor please, it has been conceded that North Dakota has established the Uniform Sales Act as we have it in California, in toto, and it's identical. In Section 1732 of our Civil Code which is part of our Unform Sales Act, under "Definition of Express Warranties," it says—

"Any affirmation of fact, or any promise by the

seller relating to the goods, is an expressed warranty if the natural tendency of such affirmation, or promise, is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. [191] No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." Now, her testimony is that she saw Cara Nome products listed. That's all. She doesn't know anything else that she read in relation to Cara Nome products. Now I submit to your Honor, that the mere listing of Cara Nome products, the various products that they make, in a national publication, is not an affirmation of fact or any promise by the seller. It isn't even an opinion as to the value of the goods. Now, if they are going to rely upon that statement that "Rexall stands behind their goods," I think that falls far short of the definition of a warranty, and comes within the exception which says "no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion, shall be construed as a warranty." Now, the guarantee that she got is a mere statement as to the value of the goods, and it most certainly is expressed because they offered to refund twice the purchase price if they don't think that this product is better than any other cold wave that they have used. There's no affirmation in here——

Mr. Lanier: I wonder, your Honor, if I could get the Northeastern Advance Sheets? [192]

Mr. Packard: (Continuing) ——I may state, your Honor, that——

The Court: I think it's lying right there.

Mr. Packard: (Continuing) ——I have picked up the first one marked here and it does have down here, in a little block, along with many other Cara Nome curl permanent — it says "Available in two kits, one designed for normal hair, the other for dyed or bleached hair, general acting."

Mr. Rourke: General acting—if that isn't a statement of fact, I don't know what is.

Mr. Packard: All right. It says "general acting," but that means to be followed according to direction; but what is the warranty? The warranty says "All Rexall drug products are guaranteed to give satisfactory or your money back." It doesn't say they're safer than any other, you will not be injured by them, and so forth. And then it says, "You can depend on any drug product that bears the name of Rexall." That doesn't say anything.

Mr. Rourke: It doesn't?

Mr. Bradish: It says you can depend on it, but it certainly falls [193] short of an express warranty under the definition.

The Court: Of course, that's a matter that can be argued on, as to the meaning of them, but the question now is, are they properly tendered into evidence.

Mr. Bradish: There's no evidence, your Honor, that she saw any of these ads.

Mr. Packard: I join in the objection. Furthermore, I submit to the Court, insofar as my client

is concerned, on the warranty, he did not disseminate them, he did not pay for them, and there is no foundation whatsoever insofar as the defendant Lewis is concerned relative to the dissemination or publication——

The Court: Well, of course, Rexall is your distributor.

Mr. Lanier: The testimony also, if the Court will recall, of Arnold Lewis is that he makes Cara Nome exclusively for Rexall.

Mr. Packard: Well, but we can't be bound by what—Rexall may say this is the greatest product that's ever been on the market, but that doesn't mean we agree with all the advertisements that Rexall may put on the market, disseminate——

Mr. Lanier: May I read this language, your Honor, in Rogers v. Toni Home Permanent (147 N.E. 2d 612):

"Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss."

Now, the whole point, your Honor, is that, first of all, we have the right to show the scope of their advertising, if we went no further, and what they have done and said under the name "Cara Nome" and under the name "Rexall," or either of them. It would be admissible for that purpose, if for none other. Secondly, they testified that these advertisements have been made through the Farm Journal. She is a subscriber to the Farm Journal. She stated specifically, not generally, that she has read their ads in the Farm Journal. These mats and proofs being a part of them. That she has been where they have said "gentle, safe"; that she has seen that Rexall stands behind its products. She is relying upon the quality of——

The Court: It doesn't say "it's safe," does it?

Mr. Lanier: Some of your ads were, your Honor. [195] Also I might add that the directions on the kit say "quicker, easier, safer," that was in the kit itself, and in their ads also some of them do.

Mr. Bradish: There again, we didn't put the directions on the kit at all. The manufacturer put those on. May I see that citation? You said something——

Mr. Packard: There is an interesting thing, if I may say, about this citation. You know, yesterday afternoon your Honor, just to relax a little after leaving Court, I went back to my office and on my desk was the American Bar Association Journal, so I always pick it up and read the section "What's New in the Law," so what shall I find but the case that Mr. Lanier cited here. Here it says—

"Sale, Warranties. The Supreme Court of Ohio has advanced into pioneer ground by holding that lack of privity does not prevent the ultimate consumer of a cosmetic from maintaining an action against the manufacturer for breach of an express warranty, but three judges have protested that the Court went further than necessary to dispose of the case." And it goes on to discuss the case and it tells that it was based upon deceit—they alleged a certain cause of action based upon deceit, which we don't have here. Then it says, the last paragraph says: [196]

"Three judges concurred separately, believing that the count should stand because it alleged an action based on deceit——

Mr. Lanier: That's the dissent though, counsel.

Mr. Packard: All right. (Continuing) "——but remonstrating that the majority had unnecessarily based its conclusion upon pronouncements of law which is expressly recognized as being opposed to the present weight of authorities and discarding legal concepts of the past, and as possibly conflicting with previous decisions of this Court."

Now what counsel has asked this Court to do in this case right here now is to pioneer—I mean on letting these depositions in, on these warranties, without privy, and so forth, and I don't feel that this Court should pioneer on all the rulings, and the matters before it. This is just interesting. I just picked this up yesterday as I got back to the office and started reading that.

The Court: I notice the dissenting opinion there,

Mr. Lanier, was written by Judge Taft. I wonder what Taft that is?

Mr. Lanier: I would presume he is part of the same family. I don't know either. [197]

Mr. Packard: We will argue that point at the proper stage of the proceedings. (Laughter.) Before the Court is the admissibility of these documents.

Mr. Lanier: Of course, on the point that counsel brings up, don't get me wrong, your Honor, I don't ever like to be in a position of misleading a Court, and we've got these cases to live with. There's no question of a conflict of law; however, that is one of the reasons I left the California Law Review article with the Court. There are many other good ones. The Tennessee Law Review, the last issue for instance, has an excellent coverage——

The Court: I haven't read that Law Review article.

Mr. Lanier (Continuing): ——but it is not quite like counsel says. The definite tendency right now, markedly, is to put it in the same category with food and drugs and all of your recent decisions, your very recent ones, are coming in tending and leaning that way, particularly in your good jurisdictions, and the California Law Review article very clearly points it out, not quite as simply as counsel says.

Mr. Packard: Your Honor, I just can't see why this Court should go into the pioneering field; I mean, let's look at the law. [198] There isn't a single case in the State of California—well, counsel

concede there isn't any in North Dakota, or under the Uniform Sales Act, there isn't a single case in the State of California which holds that anything other than food stuff for human consumption recognizes that the warranty goes without privy——

The Court: I'm going to be against you on that, Mr. Packard, I'll be against you on that.

Mr. Packard: Well, that's contrary to all the——

The Court: Well, it may be; it's not all the law, but I think it should be the law.

Mr. Packard: But counsel has come in here, your Honor, and he has picked up the Ohio State which the American Bar have read, and that's their opinion. You're not bound by that, but it's quite obvious, they're pioneering. Then he cites you a Massachusetts case on the point of using these depositions, and the Massachusetts law is the minority view on this particular doctrine of allergies and so forth, and the purpose for which this evidence was admitted in Massachusetts. So we're taking all the minority rules, all over the United States, and we're following all of the minority. That's what it appears to me. [199]

Mr. Lanier: That's an incorrect statement, counsel.

Mr. Packard: Let's look to North Dakota and there's no law there, then look to California and New York——

Mr. Lanier: No, you don't look to California——

The Court: I think California has to be considered. If you have similar statutes in the two states,

I think the California interpretation of the statute certainly is worthy of——

Mr. Lanier: I don't question that, your Honor——

Mr. Bradish: We have a rather leading case by our Supreme Court on the necessity of privity, which——

The Court: Well——

Mr. Packard: Let's wait, we've got too many matters going at one time here.

The Court: I have already ruled on the depositions.

Mr. Packard: He has ruled on that.

The Court: I have already ruled on that. [200]

Mr. Packard: And of course our objections have been noted in the record.

The Court: Your objections have been noted, that's right.

Mr. Lanier: The offer now has been to the ads, your Honor, to be admitted.

The Court: The only evidence that anybody read those ads in connection with this case was Mrs. Nihill's reading of the ad in the Farm Journal, if I recall correctly——

Mr. Bradish: Reading of an ad.

The Court: What?

Mr. Bradish: The reading of an ad. There's no evidence that one of these was the ad that she read.

The Court: Yes.

Mr. Rourke: Of course the quoted material is the identical material she read.

Mr. Bradish: I think that's probably very likely after she read these.

Mr. Lanier: She has never read this counsel——

Mr. Rourke: She has never seen these.

Mr. Lanier (Continuing): ——never been submitted to her nor shown to her, and they have been in the clerk's possession. At no time has she ever seen them.

Mr. Packard: She probably knows what's in them though.

Mr. Lanier: Why of course she does because she has seen them. That's what she testified to.

Mr. Packard: Somebody probably told her what the ads say, I'm sure of that.

The Court: Recriminations never got any lawyers anywhere with the court or anybody else. Just stick to your own arguments. Why, I can't conceive, Mr. Lanier, why the fact that they have advertised widely, unless it's brought to the attention of the purchaser, that would make them admissible.

Mr. Lanier: My only point there, your Honor, is that they have been brought to the attention of the purchaser. She has testified that she has read them many times and in particular one magazine, the Farm Journal,—— [202]

The Court: Well, I'll let them in. It's your case, Mr. Lanier. If you get me in trouble here, why it's your poor little gal that's going to suffer from it.

Mr. Bradish: The record, I suppose, has noted our objections.

The Court: Noted your objections. That will be protected.

(Thereupon, Plaintiff's Exhibits Nos. 8 through 25, heretofore marked for identification, were received in evidence and made a part of this record.)

Mr. Packard: There's one further thing, your Honor. You have admitted—I shouldn't say "admitted", but you intend to permit the reading of the depositions over our objections. Now, there's the problem of the certain, specific objections, other than "no foundation", and it's immaterial, irrelevant, and incompetent.

The Court: As to the form of the question calling for a conclusion, as I recall.

Mr. Packard: Yes, do you want us to make that when they take the stand.

The Court: I'm going to permit that to be read as it is. [203]

Mr. Packard: You mean you are not going to sustain any objection?

The Court: No. That's right.

Mr. Packard: Well may we—we hate to get——

The Court: I think it's perfectly all right for you to do that. I don't know any reason why you shouldn't make your record as you go along because, after all, that's the only way a case can be tried.

Mr. Packard: I thought maybe we could have a stipulation. We've objected to certain questions in Chambers here, and then we won't have to be standing up——

The Court: Well, if counsel wishes, we can make that stipulation. I don't see anything to be lost by it. You will have to stand on the validity of your questions.

Mr. Lanier: Well, now, there's only one thing, your Honor. I have no objection to that. I think I know what counsel is talking about. The only thing is, what objection they make.

The Court: Well, suppose you state your objections then in the court [204] room.

Mr. Packard: Okay, fine.

Mr. Bradish: As they are reached?

The Court: Yes, within reason; I don't know how many objections there are.

Mr. Bradish: There's dozens of them.

The Court: They are all based upon the same thing, aren't they?

Mr. Bradish: Generally speaking, it's based upon the fact that the question calls for a conclusion and opinion of the witness.

Mr. Lanier: Well, now, counsel, if it will help any, so far as conclusion and opinion is concerned, I am certainly willing to stipulate you've got that same objection to all the questions.

Mr. Packard: Well, I'll accept that stipulation that opinion and conclusion objections interposed by my client, Lewis—and I've already noted my objections to the reading of the depositions, to the foundation, that it's immaterial, irrelevant and incompetent, and then if there is any [205] further objections other than objections that it calls for a

conclusion or an opinion, I will note them in the court room.

Mr. Bradish: I'll join in that with the understanding that by not objecting to each particular question on the ground that it calls for a conclusion and opinion, that we haven't waived our right to have the court consider that that objection is made to those questions which we feel do call for the opinion.

Mr. Lanier: It is so stipulated.

Mr. Bradish: And do I understand that, as to any objection which will be made to calling for the conclusion, or opinion, of the witness, that your Honor is overruling that?

The Court: Overruling the objection. Is that satisfactory with you, Mr. Lanier?

Mr. Lanier: So stipulated, your Honor.

The Court: Now, let's get down to the merits of this thing.

Mr. Packard: We have the stipulations already in, that, for the purpose [206] of this Motion, it has been stipulated to that the depositions have been read over the objections noted; that the plaintiffs have rested their case, and at this time, the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, moves the Court for a dismissal as to the first cause of action upon the basis that the plaintiff has failed to state a prima facie case as against said defendant; that, taking all the evidence in the light most favorable to the plaintiff, and drawing all the reasonable inferences in the light most favorable to the plaintiff, they

have failed to show that there was any negligence on the part of the defendant, Arnold Lewis, in the compounding, mixing or distributing of this particular—or labeling—of this particular product. There's not one iota of evidence in this record showing that the chemical composition, or the mixture of the component parts of this product, did not conform to the normal, accepted, standard, cold wave solution that's distributed throughout this country; that counsel has apparently attempted to put on evidence here to show that this girl had a permanent wave, using this type of solution, on February 5, 1955, and that, thereafter, she saw a doctor on the 28th—her hair was falling out and it continued to fall out and progressed until she got in the position she is at the present time, or lost all her hair practically. I submit to the Court that the evidence of [207] the plaintiff shows that they had a bottle with the same code on it, they could have analyzed it, they could have come in and had some testimony, and the proper way to prove a case of this nature—I believe you have read the case of Briggs vs. National Industry, and so forth, to show what the chemical composition was, and it was in such concentration that it was a direct irritant to some particular portion of the body, or it was in such concentration that it would cause this particular end result. I submit to the Court that there is no such evidence in this case. The only evidence in here is evidence of the fact that chemicals contained in hair wave solutions can be irritants. Now that means that every single manufac-

turer of a cold wave solution in this country is liable for, if the Court permits this to go to the jury on that issue, is liable for any untoward results. Anybody suffers by reason of any cold wave solution if the Court believes that just because there is a chemical composition in this cold wave which is in every cold wave which is an irritant, that if someone has an untoward result, that the manufacturer is responsible, and that certainly is not the law, and to permit this matter to go to the jury on the issue of negligence I feel is not proper, and I feel that there is no evidence whatsoever in this case which would sustain a verdict, in the event a verdict was rendered, [208] on the issue of negligence, and the Court at this time should dismiss the count based upon negligence on a failure on the part of the plaintiff to establish a prima facie case, and that cause of action should be dismissed.

Mr. Bradish: Do you want to hear from me, your Honor?

The Court: On the first count.

Mr. Bradish: Yes. Well, I will join with the defendant Lewis, and, on behalf of the defendant Rexall Drug Company, will make a Motion to Dismiss and, to save time, I will incorporate all of the arguments and the points urged by counsel for defendent Lewis in my Motion, and then I would like to add to that the fact that it has been admitted by all the parties in this case, that defendant Rexall Drug Company did not—I think I better read it exactly so that I won't be accused of misconstruing the admission—in the Pretrial Confer-

ence Order, under Paragraph 3—Admitted facts are as follows:

1. The plaintiff is a minor, suing through her general guardian, her father, John Nihill.

2. The defendant Rexall Drug Company, a corporation, is a Delaware corporation, authorized to do business in the State of California.

3. The defendant Arnold L. Lewis is an individual doing [209] business under the fictitious firm name and style of Studio Cosmetics Company, and a resident of California.

4. The defendant Arnold L. Lewis is the manufacturer of a product known and sold as Cara Nome Natural Curl Brand Pin Curl Permanent.

5. The defendant, Rexall Drug Company, is the national distributor of said product under purchase order introduced as Exhibit blank. Said Defendant Rexall Drug Company did not participate in the preparation or manufacture of the product, but purchased and sold said product in sealed containers as received from the defendant, Arnold L. Lewis, doing business as "Studio Cosmetics Company". Then there's two other paragraphs that are not material, and then this language:

"These admissions of fact were true at all times material herein."

Paragraph IV:

"There are no reservations as to the facts stated in paragraph III".

Now, your Honor, in order for the plaintiff to recover from the defendant, Rexall Drug Company,

on account of negligence, they must do one of two things. They either must offer evidence that we were negligent in the preparation and compounding of the substance used, or they must offer evidence to prove that there was a duty incumbent upon [210] Rexall Drug Company to make tests and inspections of the solution in the cold wave. I think, by their own admission just read, they can't possibly urge—or offer—any evidence of any negligence on the part of defendant Rexall Drug Company, in the manufacture and preparation, because they have admitted that we had nothing to do with it. Insofar as the other possiblity, that of a duty to inspect, there has been no evidence offered that there is any duty incumbent upon this defendant, as a distributor, to inspect any of the products that they distribute at all. That duty, if it did exist, could be offered either by way of statute—statutory requirements—requiring a distributor to make such tests, or case law, which held that it was the duty of a distributor to test each of the products which they distributed, and I submit to the Court that the law in our Sate is directly contrary to that particular contention that there is any duty on the distributor to inspect or make tests of any products that they distribute. That duty rests solely upon the manufacturer. So, insofar as defendant, Rexall Drug Company, is concerned, with what I adopted of Mr. Packard's argument, plus what I have just read to the Court, and indicated to the Court as further grounds for Rexall Drug Company's motion to dismiss the first

county, I urge the motion on that in behalf of that defendant, reserving of [211] course the right to move as to the second count.

The Court: Now, Mr. Lanier, you might reply to their arguments as to the first count.

Mr. Lanier: May the record show that the motion is resisted, your Honor.

The Court: No special reply?

Mr. Lanier: I have no special argument.

The Court: Well I'd like to hear from you on Mr.——

Mr. Lanier: Well, then, if the Court would, I'd be glad to. First of all, may I——

The Court: Where is the negligence on the part of the drug company?

Mr. Lanier: The drug company, your Honor, as the manufacturer who he has to supply him, exclusively, as the record shows, with this product, for sale under his name, not just a product that he's getting—"X" product—but it's made up "Rexall Cara Nome", under his name. Then he distributes [212] to his retailer the product, and as such he is liable for the product that has his name on it, the Rexall Company stands behind it. Your ads which are in evidence state the "Rexall Company stands behind" this product——

The Court: Well, now, that doesn't quite reach the point of negligence.

Mr. Lanier: Now then, again we come back to where we are arguing weight, your Honor. If there has been no negligence shown, and if, for instance, res ipsa doesn't apply, which it does under

the North Dakota law, which is one of the things—counsel argues the Briggs case in California—the Briggs case has nothing to do with this lawsuit. Burt vs. Lake Region Flying Service, is the North Dakota law——

The Court: You look on this case as being against, in a fashion, a single entity, consisting of the manufacturer and Rexall as being liable for anything to which liability can attach regardless of the separateness of their——

Mr. Lanier: That is correct, your Honor. Now, for instance, let's take the retailer himself, take the local druggist. The local druggist himself gets the packaged goods, Rexall Cara Nome. Now he, himself, makes no guarantee that he [213] stands behind this particular product, it comes to him sealed; but Rexall, under the proof in the record, orders this shipped from the manufacturer to the retailer with the name Rexall on it. It is manufactured for Rexall and it is "Rexall Cara Nome", not just "Cara Nome". It's "Rexall Cara Nome", and they, themselves, stand behind the Rexall products, and the two of them stand in exactly the same light.

Mr. Packard: Before your Honor rules, I'd like to be heard a little further. In other words, when I argued my Motion, I was arguing on negligence, and counsel is indicating he feels res ipsa loquitur applies, and I don't want to—the Court could feel that I haven't any answer for that except——

The Court: You don't want me to think you concede that?

Mr. Packard: No. That is a point, and I thought, if counsel were going to argue res ipsa, then I wanted to answer to that, and, apparently, he said there was no argument, and he wanted the Court to go ahead and rule, but I want the Court to have the benefit of my thoughts on whether the doctrine of res ipsa loquitur applies or not. I was arguing that—— [214]

The Court: I'm not compelled to rule on that at this time, am I?

Mr. Lanier: I wouldn't think so, your Honor, except when he says there's no proof of negligence. Counsel is now moving on the first count which is the negligence. Certainly the question of res ipsa enters into it.

The Court: It might well with reference to Mr. Packard's client, but I can't quite see it on the Rexall, Mr. Lanier.

Mr. Bradish: I ask the Court to look at this exhibit, and I submit to the Court that nowhere on this package will you find the word "Rexall". This is Cara Nome Natural Pin Curl Permanent. Rexall's name is not displayed anywhere.

Mr. Lanier: You have a Rexall guarantee within the package, your Honor.

Mr. Bradish: You are not proceeding on the guarantee and, besides, all of this argument about Rexall's name or guarantee goes to the cause of action in warranty, it doesn't go to the cause of action in negligence.

The Court: We are talking about negligence now, Mr. Lanier. [215]

Mr. Lanier: Yes. My point is that Rexall and the Cara Nome and the defendant Studio Cosmetics, so far as this lawsuit is concerned, and the negligence in the making of this product, or any harmful or deterent results that it would have, are one and the same, so far as their liability is concerned. As a matter of fact, I think it's their very name, is it not?

Mr. Bradish: It's a trademark name.

Mr. Rourke: Trademark by Rexall.

Mr. Bradish: That's true, but how does the fact that you trademark a name and a manufacturer manufactures for you a product under that trade name, how does that attach any negligence whatsoever on the part of the distributor?

Mr. Rourke: Because you can't just delegate all of your duties of inspection to somebody else.

Mr. Bradish: Have you got any cases that hold that?

Mr. Rourke: Why certainly.

Mr. Bradish: I'd sure like to—— [216]

Mr. Packard: I don't know whether the Court is familiar with what we are talking about—negligence and warranty—it seems to me we are getting ourselves a little confused here. I was intending to take one subject at a time.

The Court: That's what we are trying to do, Mr. Packard.

Mr. Packard: Now, have you finished——

Mr. Lanier: I have finished only if I have an-

swered what the Court is inquiring about. So far as the manufacturer here is concerned, Studio Cosmetics, and Rexall Drug is concerned, if there is any harmful effects, any negligent acts, which causes harm, they are one and the same. Under the testimony that is in, Studio Cosmetics exclusively makes this product for Rexall. Rexall exclusively merchandises it, and from the manufacturer. Is that right? They have the duty and are just as responsible as the manufacturer, when that product is shipped to a retailer, of inspection, and to see to it that it has the proper chemicals and it does not have any harmful ingredients.

Mr. Packard: That's if they put their name on that box——

Mr. Lanier: You put the guarantee of Rexall within the container. You [217] connect your name with Cara Nome. You have the duty of inspection.

Mr. Packard: I think the evidence is that the local druggist did.

The Court: Well the Motion will be denied as to the first count. That is for the present, but I'll hear you again at the conclusion of the case.

Mr. Packard: Well I haven't argued res ipsa, and——

The Court: Well, that isn't involved necessarily. That will come on later.

Mr. Packard: Well I anticipated—I have the cases, maybe I could just briefly, just in a few minutes, point out my thinking for the benefit of the Court.

The Court: Go ahead. I might need that, as I think about it.

Mr. Packard: One of our leading older California Supreme Court cases, is Olson vs. Whittorne, 203 Cal. 206——

The Court: That means the Supreme Court, or——

Mr. Packard: That's our highest appellate court.

The Court: What is the page?

Mr. Packard: It's at page 206. I'll just read this. This is just going to take me a second, your Honor, if you will bear with me:

"The plaintiff contends in the trial and now contends that the doctrine of res ipsa loquitur should apply to the situation presented on her behalf——

Mr. Lanier: Excuse me, counsel, what's the name of the case?

Mr. Packard: Olson vs. Whittorne & Swan.

Mr. Lanier: All right.

Mr. Packard (Continuing): "We think this is a case in which the doctrine is not applicable. To render the doctrine applicable, it must be shown that the instrumentality causing the injury was under the control of the defendant and that the injury was caused by some act incident to the control, and the injury must be of such a nature that it ordinarily would not have occurred but for the defendant's negligence." Now, that, I think, meets the three requirements, your Honor, which I will discuss more at length [219] later on, but all over the country those are the three requirements in

order for the doctrine, but here is what the Court further goes on to say:

"It does not apply where an unexplained accident might have been caused by plaintiff's negligence". Now the testimony of the medical experts said that it might have been caused by this cold wave solution. But the Court says "It does not apply where an unexplained accident might have been caused by plaintiff's negligence, or been due to one of several causes for some of which defendant is not responsible". And that's what we are claiming here, that the medical testimony thoroughly has been here that it might have been caused by this, but this is unexplained, it may be caused by various factors as alopecia areata, and so her condition might have been caused by other conditions other than the negligence, and I'll go back and argue the cases when they start talking about weighing the probabilities of negligence. I think that's the test in California, and that's the test in res ipsa, is to weighing the probabilities, and the probability has to preponderate in an inference that it must have been the negligence of defendant, and certainly the probabilities do not preponderate in this case in showing that the accident must have been brought about by negligence of the defendant or this condition would not have resulted, because I think the [220] probabilities in this case tend to go the other way, to show that she had an unfortunate situation —a systemic condition—something caused her hair to fall out, but it could have been certainly something other than the application because all the

evidence in the case—there is no direct sensitivity or irritation to the scalp. It was placed on the hair, the hair itself does not have any life or nerves, but it comes from down within the body, and if her sole injury was just the breaking off of her hair and it grew out naturally, that may be a little different situation; but that's not the situation here. Her hair fell out from a systemic condition within her, and I think the probabilities favor more that it was due to some systemic condition, or something not within the control of the defendant. I'm citing Seneris vs. Hall which happens to be one of the leading cases in this State, in which I happened to take the depositions—my firm handled it—a California case. 45 Cal. (2) 811, 824. And this is a malpractice case where they injected a spinal anathetic into the plaintiff and her legs became paralyzed, and a non-suit was granted and it was reversed, but reversed on grounds holding that explanation was more within the knowledge of the defendant and so forth, but it does discuss this law, and I think it's one of the leading cases, and it cites our Coca Cola cases—that is, [221] within that case you will find these other cases are leading cases, and it goes on. I'll read part of it:

"The application—this is at 824—the application of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their—defendants' negligence". "More likely * * * the result". "Where no such balance of probabilities in favor of negligence can

be found, res ipsa loquitur does not apply". Now I'm only arguing the probabilities, I'm not arguing the control of instrumentalities——

The Court: Suppose we pass on from——

Mr. Packard: I'd like to give the Court one further case. 141 Cal. Ap. (2nd), 857—and incidentally, this case is a case which I personally tried, lost it for $57,000, got a judgment notwithstanding the verdict. It was upheld in the District Court and it went on up and the Supreme Court denied a hearing, meaning that the Supreme Court had passed upon it and said that the opinion was okay, but I would like to read just this one part of the case; the question was if the doctrine of res ipsa applied. My motion for a judgment notwithstanding was granted on the basis that there was no showing of proximate cause between any negligence and the injured. And the Court [222] goes on and points out:

"That defendants' negligence could possibly have been the cause, is not sufficient. The proof must be sufficient to raise a reasonable inference that the negligence complained of was the proximate cause of the injury. If that is not the result of the evidence, if the fact finder is left in doubt and uncertainty, he cannot base a verdict or finding on guess or conjecture", and that was the point I was raising yesterday on the proximate cause. The evidence here is that—your only evidence—"well, it might have been or could have been caused by this; but, yes, there's other factors that cause alopecia areata and can cause this condition." I could

argue further about it. I know the Court would like maybe to——

Mr. Bradish: The language is very strong in support of our contention that res ipsa doesn't apply in the case cited by counsel for the plaintiff.

The Court: Which case is that?

Mr. Bradish: Bish vs. Employers Liability Insurance Corporation, 236 Fed. (2d), 62.

Mr. Lanier: We're in agreement then, your Honor, we both can rely on [223] that.

Mr. Bradish: This is a Toni case where the verdict was for the defendant.

The Court: What's the page of that case?

Mr. Bradish: It starts on page 62, and over on 67—one of the contentions was that the Court erred in giving res ipsa in the form submitted by the plaintiff—and this court says:

"Only when the cause is established and the manufacturer is identified with it may res ipsa loquitur be called upon to supply——

The Court: Well, isn't that a question for the jury, whether——

Mr. Bradish: "Cause"? No, because it goes on, your Honor, and——

Mr. Lanier: Counsel, are you contending that proximate cause isn't a question for the jury?

Mr. Bradish: No, I'm not contending that, but I'm contending that where the proof is so lacking—and they say so right in this case—they say "* * * the mere possibility that defendant's act could have caused the damage does not warrant the application of the doctrine, and the same is true where it

is a matter of surmise or conjecture only that the damage was due to a cause for which the [224] defendant is liable". Now, in our case, the only evidence we have is from Dr. Levitt and he said that the cold wave could have caused her to lose her hair, but that certainly is a long way short of establishing the cause. That's a possibility.

Mr. Packard: That's correct, and he also testified there are other causes and some of them are unknown, and there's a controversy in the medical profession as to what these causes are.

The Court: Now, do you want to argue with reference to the second count?

The Clerk: The jury is ready.

The Court: Well, I'll hear the rest of this.

Mr. Packard: I'd like to, first of all, my argument to show that we move to Dismiss the entire Complaint, each of the causes of action, on the basis that there is no showing of proximate cause. I cited the cases. And we move now on behalf of——

Mr. Lanier: Excuse me, counsel. That last motion is resisted.

Mr. Packard (Continuing): Then the next Motion, on behalf of the defendant, Arnold Lewis, is to dismiss the second cause of action upon the basis that there has not been any [225] evidence in this case which will support a finding, or which a prima facie case has been established against the defendant Lewis for breach of any warranty, either express or implied, and that action should be dismissed as to—I say "that", I refer to the second

cause of action as against the defendant Arnold Lewis. You know, when I read this Free vs. Sluss —I had it in my authorities here——

The Court: What case is that?

Mr. Packard: That's where they had—the manufacturer printed a guarantee, the guarantee was to refund the whole purchase price upon a return of the unused portion and that, your Honor, was one of our Municipal Court cases, and that was a lower court case——

The Court: How do you cite that case?

Mr. Packard: Well, it's 87 Cal. Ap. (2) 933, but I wanted to point out to the Court—I don't want to belabor the point, but I want to point out the various courts and how they come about, knowing you are from Illinois—and in this particular case which arose in our Municipal Court, which is lower than—well it's our jurisdiction up to three thousand, and above the Municipal [226] Courts are Superior Courts with unlimited jurisdiction, and this arose in the Municipal Court. Then, in order to take an appeal from the Municipal Court, you take it to the appellate department of our Superior Court and then you're through there—see? So, his is an inferior case. When I say that—and actually this opinion is not controlling insofar as it is not an opinion of our District Court of Appeals or our Supreme Court, but it's reported in our Appellate Court Reports, but it's the decision of our Superior Court, appellate department, and in our Superior Court, right across the street here, we have three judges—they call them "justices" of the

appellate department of the Superior Courts, to hear appeals from our Municipal Court, and you are through there. And that's how this case arose. But there is no personal injury and I don't know whether you're read it or not, but the Court went on and—this is a case where soap was sent out to a dealer and it——

The Court: I don't think I read it.

Mr. Packard (Continuing): ——and it says the manufacturer and distributor—a grocery man, like Rexall in North Dakota—purchased, say, from Rexall and from Lewis, a product, and then it says "your money back, to be refunded if you return the unused [227] portion", so they sent this soap out and they tested it. His wife had a washing machine there and they sold twenty-five cases, and so they ordered another hundred cases and when it came out, it was terrible and they admitted it and the evidence was clear—it was during the War and they couldn't get these ingredients in it, and it wasn't satisfactory, so they demanded their money back, the grocery store as against the distributor and the manufacturer. It would be like if the druggist—Olig in North Dakota—said to Rexall and to Lewis, "I want my money back for this Cara Nome; I have this guarantee here that's in evidence, and we are supposed to get our money back", and they wouldn't refund it. And they went off on the question that they were really purchasing by a sample. The first twenty-five were satisfactory and good, and they ordered again and it didn't meet up and they admitted that they hadn't

put certain ingredients in and so forth. So I don't feel that that case is controlling at all in this situation here. The second shipment of soap to this grocery store wasn't the same as the first and they had this guarantee which said the money was to be refunded if it wasn't satisfactory.

The Court: Who is contending it's controlling?

Mr. Lanier: I cite it an an authority, your Honor. I don't necessarily say it's controlling. I think it's very excellent authority, it's the second highest court in the State——

Mr. Packard: The second highest? It's our lowest. It isn't even authority,——

Mr. Lanier: The opinion is written by the appellate division of the second highest court in the State.

Mr. Packard: No, it is not, counsel. I wish to differ with you.

The Court: Don't get off on a side issue now——

Mr. Packard: It is from our trial court, sitting as an Appellate Court to take the inferior courts' appeals and decide them, but they just happened to put them in those books.

Mr. Lanier: It could be a misunderstanding on my part.

Mr. Packard: Yes, it is. The Superior Courts are our trial courts, so it's from the appellate department of our trial court which hears appeals from an inferior court—— [229]

Mr. Lanier: I think I follow you.

The Court: All right. Now then we are on the question of the second count.

Mr. Bradish: Yes. Are you through?

The Court: Yes, are you through?

Mr. Packard: Well, I contend that there is no privity—that was one thing—between the ultimate consumer and the manufacturer; that this doesn't come within any of the exceptions; that California law has only gone so far as to say that lack of privity only runs as to food stuff for human consumption; that, further, as far as any warranties they are claiming, we might say the Briggs case went off and discussed the fact that——

The Court: What did it involve?

Mr. Packard: It was a cold wave, exactly the same; they had testimony on the percentage of thioglycolate. I don't believe you've read that——

The Court: Yes, I read it at the time, that was several days ago—— [230]

Mr. Packard: It's 92 Cal. Ap. (2nd) 542.

The Court: Is that in the inferior court too?

Mr. Packard: No, that's the District Court of Appeals.

The Court: What page?

Mr. Packard: 542. That actually is the leading case on this particular type of case, and in that case they went on to say that the preparation was intended for application to the hair rather than to the skin, and that's one where she had a reaction, and that was given in a beauty shop, and they sued the shop and the manufacturer, and they had expert testimony as to the content of the thioglycolate acid. And also there's Section 1735 of our Civil Code, subsection IV, in reference to warranties. It says "In a case of a contract to sell, or sale of a specified arti-

cle, under its patent or other tradename, there is no implied warranty as to its fitness for any particular purpose," and that's under the Uniform Sales—in other words, if you buy it under its tradename, there's no implied warranty for the fitness for the particular purpose—no implied [231] warranty as to its fitness for any particular purpose.

The Court: How do you get away from that, Mr. Lanier?

Mr. Lanier: Well, first of all, your Honor, I want to point out one or two things about the Briggs case, to the Court. First of all, as far as the Briggs case is concerned, plaintiff's own doctor testified positively to an allergy, that it was caused by an allergy. That's one of the big distinctions in the Briggs case. Their own doctor testified that she did have an allergy. We all concede an allergy is a defense. That's No. 1. Secondly, there was a stipulated 6.2 ammonium thioglycolate content, and her own doctor testified that it would have to go over 7 before it would be harmful. That's two things. Now, when we come back to the question of breach of warranty and the necessity for privity, that has been the California holding. In that relation, however, I would like to call the Court's attention to Tingey vs. Houghton. That's 30 Cal. (2), Supreme Court, page 97. That is going to the question of whether or not there is proof necessary. I would like to cite for the court also 209 Fed. (2nd) 130; 235 Fed. (2d) 897; 236 Fed. (2d) 69. Now my first point is this. This case is, of course, under North Dakota law. North Dakota has no [232] case on

privity of contract between the manufacturer and an ultimate buyer. Hence, the California Federal Court is free. There are no privity cases of this type in the Ninth Federal Circuit. California is only one jurisdiction. In other words, my point—to begin with, this Briggs case is not controlling at all upon the Court. It is a case to be considered, of course, by this Court; but this Court is interpreting not California law, this Court is interpreting North Dakota law, and North Dakota has no pronouncement on it. The Briggs case stands in no better light than the Toni case in Louisiana—no, the Toni case in Ohio, which is the most recent pronouncement in the United States on it, nor the Yardley case in Massachusetts, nor those cases which hold that the advertising is a warranty to the general public and, that, of course, is my entire position. I do not dispute with the Briggs case insofar as the Briggs holding is concerned, and it holds privity of contract necessary, and in this case there is no privity of contract; but, of course, that isn't at all binding on this Court. We are not in State Court, which I think is one of the things which counsel has presumed all the way through this lawsuit. [233]

The Court: Back to my original question, what about this statute that somebody mentioned over here?

Mr. Packard: 1735 (4), that there is no implied warranty——

Mr. Bradish: I think counsel is not distinguishing between express and implied. I think both of them should be——

The Court: There is a sales law in this State.

Mr. Bradish: Which is North Dakota law.

The Court: That's right. Now, then, this other——

Mr. Lanier: It is the same.

Mr. Packard: 1735, sub-section (4) provides that when you buy by a tradename or a trademark and there is no implied warranty, that it's suitable or fit for any particular purpose,——

Mr. Lanier: Of course that is the Briggs case.

Mr. Bradish: That's the law, that's the Uniform Sales Act. [234]

The Court: Is that in North Dakota also?

Mr. Packard: Yes.

Mr. Lanier: Yes. It's uniform, and that is North Dakota law except we've had no interpretation on the law, insofar as the implied warranty is concerned. Of course, the Briggs case definitely holds that there is no implied warranty and I have no particular dispute with it. Our grounds insofar as the law of the country is concerned on implied warranty, your Honor, is in the minority. Implied warranty for——

The Court: Well, I'm bound by statute. What's the effect of that statute?

Mr. Lanier: Well, as most cases in the country have interpreted it, your Honor, there is no implied warranty. I'm not resisting implied warranty very strenuously. I do in the record; I want to protect my record on it, but so far as breach of implied warranty is concerned, the cases are against us.

Mr. Bradish: Well, perhaps I better make my

little pitch. I'm going [235] to make my Motion on behalf of Rexall——

The Court: You gentlemen realize that I'm trying to get a little education here as I go along.

Mr. Packard: I think we all are, your Honor.

Mr. Bradish (Continuing): ——As to the second count and on behalf of Rexall, I would make my Motion to Dismiss in two parts based upon two grounds. The count sounds in warranty and in the initial Amended Complaint sounds in implied warranty; however, by permission of this Court, prior to the taking of any evidence, counsel was permitted to amend the pretrial order to include issues which were referable to express warranty. Insofar as the implied warranty is concerned, I think the Motion should be granted on the grounds that it comes squarely within the Uniform Sales Act which has been admitted to be the law of North Dakota and the law of California, and when you consider the evidence that this lady went to the drug-store for the sole purpose of buying a Cara Nome wave set, she was most certainly buying it by a tradename. I don't think that there is any question but what there can be no implied warranty in this case. Now, that leads us to the second possibility of a cause of action under Count two and that is [236] for express warranty and in support of my Motion for that, I would like to urge that under our law, in California, our cases which have interpreted the Uniform Sales Act, which is the law of North Dakota—the Uniform Sales Act is the law of North Dakota—our cases which have interpreted the stat-

utory law of California and, of necessity, the same statutory law of North Dakota, hold that there has to be privity of contract before an express warranty will attach. Now, counsel has admitted that there are no cases interpreting, or giving us any lead as to North Dakota's interpretation of the Uniform Sales Act, and he has attempted to cite cases throughout the country in other jurisdictions which we do not know follow, or have adopted, the Uniform Sales Act. So, since this Court is free to accept the law of another jurisdiction, if the substantive law of the State that you are bound to follow has no expression in the matter, it would seem to me most logical that this Court should follow the interpretation of the Uniform Sales Act by the California Courts, since this case is being heard in the Federal Court sitting in California, and since the North Dakota Courts have not interpreted the same Uniform Sales Act. So, I feel that the Court should, in determining this Motion, rely [237] upon the case law in California, namely, to the effect that there must be privity of contract before an express warranty will attach. Secondly, I don't think there has been any evidence of any express warranty made by the Rexall Drug Company to any party to this action or, if your Honor please, to anybody who has testified in this action. The only evidence of any possible nature upon which plaintiff can rely is the so-called guarantee which bears "Plaintiff's Exhibit No. 7," in which, on one side of the guarantee there is the language that if you don't agree that this product is as good or better than any other natural

cold wave, that you have used, we will refund double the purchase price, and under our statute, again the Uniform Sales Act, which is admittedly the law of North Dakota, an express warranty is spelled out and defined, and I believe that there is no evidence to attach any express warranty from this defendant simply by virtue of the guarantee, so-called, which has been offered into evidence. Then, we are left with one other consideration. Did the plaintiff's or the mother of the plaintiff's claim, that she saw Cara Nome products advertised in the National Farm Magazine constitute an express warranty within the meaning of our statute, the Uniform Sales Act, to the [238] mother and, I suppose vicariously, to the injured minor? The only testimony offered in that regard was that the mother saw Cara Nome advertised and saw a list of Cara Nome products. Nothing else, your Honor, insofar as Cara Nome is concerned, did she remember reading. The only other thing she said was that she read in the ad that Rexall stood behind their products. This is not, insofar as this evidence is concerned, a Rexall product—it is a Cara Nome product. The word "Rexall" does not appear on the package in any respect. So, I don't believe there has been any express warranty by virtue of the fact that this lady read an advertisement in the farm magazine, which listed Cara Nome products and which made a statement that Rexall stands behind their products. Even assuming that you could say that that assertion in the ad that Rexall stands behind its products would attach to Cara Nome—even assuming that, and certainly not

admitting it, I fail to see how a statement that Rexall stands behind their products would be an express warranty to anybody. So, I feel that insofar as implied warranty is concerned, counsel is out on their own log. Insofar as express warranty is concerned, I don't think there has been any express warranty made by this defendant to either the plaintiff to this action, or to her mother, who does not happen to be a party to the action, and, further, [239] I think that under the interpretation of the Sales Act by our California Courts, there is a failure in the second count as to this defendant, because there has not been a showing of any privity of contract between this defendant and the ultimate consumer based upon our State's courts' interpretation of the Uniform Sales Act, which is also the law of the State of North Dakota. By that I mean the Uniform Sales Act is the law of North Dakota, and we have the same law. Our Courts have interpreted it. North Dakota courts haven't. So I think your Honor would be perfectly within your rights, and it would be proper for you to consider our Court's interpretation of the same statute that exists in North Dakota as North Dakota hasn't interpreted it.

Mr. Packard: I would like for the record, your Honor, to show that I join—I have already made my motion—but I join upon the same grounds also argued by Mr. Bradish, and I point out to the Court that under our Code, Section 1735 (4), there is no implied warranty and so the only thing to consider is the express warranty and, certainly, Mr. Lewis, my client, did not disseminate any of this literature.

I mean if they are relying upon reading this Rexall apparently published in certain magazines, and certainly he wouldn't be bound by any warranties placed on t.v. or [240] magazines or anything——

The Court: (Addressing the Clerk) Will you tell the bailiff to have the jury brought in?

Mr. Lanier: May the record show that that Motion is resisted.

The Court: The Motion to Dismiss Count 2 at this time is overruled.

The Clerk: I didn't get your ruling.

The Court: The Motion on behalf of each party is denied.

Mr. Bradish: Your Honor, I think we might save a little time. I have here the original of the franchise agreement between Rexall and the Olig Drug Store which is where this product was purchased, and I have a photostat which counsel has said I may use, but he apparently is going to object to the materiality of this document in evidence, and so if I could leave it with your Honor, perhaps during the noon hour your Honor could read it and——

The Court: What's the idea? [241]

Mr. Bradish: Well, it merely shows that the drug-store is Mr. Olig's drug-store, and is not the Rexall Drug Store, as contended by counsel. They merely have a franchise agreement with Mr. Olig, whereby he can purchase Rexall products through Rexall's distributorship to sell them.

Mr. Lanier: Without getting into that now, your Honor, my point will be that it's immaterial.

The Court: I'll take a look at it.

Mr. Bradish: I also have an appointment at noon with a witness, so if your Honor could let us recess at twelve o'clock.

(Whereupon, the Court, counsel for the respective parties, the reporter and the Clerk proceeded to the Court-room, where the following proceedings were had in open Court:)

Mr. Lanier: May it please the Court, the Motion of the Plaintiff to re-open, having been allowed, and the Motion to read these depositions having now been reconsidered and allowed, I would like at this time to recall Mrs. [242] Carlson back to the stand again.

The Court: Very well.

Whereupon, the

DEPOSITION OF MRS. DONALD CARLSON

witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows:

"Direct Examination

"Q. (By Mr. Lanier): Would you state your full name, please? A. Mrs. Donald Carlson.

Q. Where do you live, Mrs. Carlson?

A. Spiritwood, North Dakota.

Q. Spiritwood, North Dakota, being in what county? A. Stutsman, isn't it?

Q. And in what county is Kensal, North Dakota?

A. Stutsman.

Q. Calling your attention to sometime in March

(Deposition of Mrs. Donald Carlson.)

of 1955, did you have any occasion to be in the Rexall Drug Store in Kensal, North Dakota?

A. Yes.

Q. And for what purpose did you go into the drug store?

A. Well, among many things I bought the Cara Nome permanent there.

Q. And did you make a purchase at the Kensal Rexall [243] Drug Store of a Cara Nome Home Permanent Wave set? A. Yes, sir.

Q. And who was with you at that time?

A. My mother-in-law, Mrs. Carl Carlson.

Q. And where does she live?

A. At Kensal.

Q. And did she also make the same purchase?

A. Yes, she did.

Q. So that when you came out you had two kits?

A. Yes.

Q. Of Cara Nome Rexall permanent wave?

A. Yes, sir.

Q. Now, did you take those kits home with you?

A. Yes.

Q. Did you and your mother-in-law, Mrs. Carl Carlson, apply the permanent wave solution?

A. Yes.

Q. For the purpose of giving yourselves a home permanent wave? A. Yes.

Q. Did you give the permanent wave to your mother-in-law? A. Yes.

Q. And who gave the permanent wave to you?

A. Myself. [244]

(Deposition of Mrs. Donald Carlson.)

Q. You gave her the permanent wave, and you gave yourself the permanent wave? A. Yes.

Q. And had you or not before this ever used Rexall Cara Nome Home Permanent Wave?

A. No.

Q. Before this time had you used other home waves? A. Yes, many.

Q. Your answer was many times?

A. Yes, quite a few.

Q. And will you tell me whether or not you read the directions enclosed with the Rexall Cara Nome kit? A. Yes.

Q. All right. Now, will you tell me whether or not you followed those directions? A. Yes.

Q. Did you follow the directions meticulously and carefully? A. Yes.

Q. Now, thereafter, will you tell me the result of that permanent wave to your hair?

A. The hair was strawy and dry, and the ends were funny-colored, more or less, they were lighter on the ends than they were at the scalp of the head just as though they were burnt, and they [245] were just frizzy, they weren't attractive or easy to manage or anything.

Q. Did anything happen in relation to the hair itself physically?

A. Well, it broke off while combing it. The ends were split.

Q. The hair? A. Yes.

Q. What did you finally do?

A. I had it cut.

(Deposition of Mrs. Donald Carlson.)

Q. How long after the application of the wave?

A. Well, I can't say exactly, but it was no more than, no less than a week or no more than two weeks.

Q. And you cut the entire hair?

A. Well, the hair was quite short. The back was so short that you couldn't put a pin curl in it. You could just barely turn the hair around the finger, and the sides were cut according to that, which were short too.

Q. Did you have occasion to, after the application by you of this Cara Nome Rexall wave to your mother-in-law's hair, did you have occasion to see her hair? A. Yes. [246]

Q. Would you describe the condition of her hair?

A. It was the same as mine, strawy, burnt on the ends. When you combed it your ends broke off, you had a comb full of hair.

Q. Have you ever used a Rexall Cara Nome home wave since? A. No.

Q. Could you describe to me whether or not when you opened the bottle of Cara Nome that it had any unusual odor?

A. None other than the smell that most permanents have.

Q. Would you tell me whether or not the use of it on your hands or on your scalp produced any unusual sensation?

A. Well, slight burning, I mean that's not really a burn. It's just your hands may be too tired from

(Deposition of Mrs. Donald Carlson.)

putting up pins, but they feel hot, the ends of your fingers, from the solution; I have always blamed it on, they say it makes them smooth and tender.

Q. Was this particular burning sensation such as you have described any different than that used by or felt by you in other home wave solutions?

A. I don't believe so. Of course, it's been so long, you know; it's been a few years. It's hard to [247] really pin it down whether it was strong or not. The only thing it did, it rusted the bobby pins.

Q. Now when you stated it rusted the bobby pins, will you tell me at what stage and when and how you noticed?

A. We took the bobby pins out of our hair the next morning. You put them in in the evening.

Q. And when taking them out the next morning, is that when you saw the rust on the bobby pins?

A. Yes.

Q. Was that in general or one or two?

A. Oh, general; threw the whole bunch away.

Q. Was it just slight or was it definite?

A. Definite.

Q. Have you ever noticed this condition before in any other bobby pins with any other wave solution?

A. Well, the Cara Nome was the only bobby pin permanent that I have ever had, but on other permanents I have never seen them. After fixing your hair, but I have never had any pin curl permanent.

Mr. Lanier: That's all."

(Deposition of Mrs. Donald Carlson.)

Mr. Lanier: Do you want to read your cross, counsel? [248]

Mr. Packard: Why don't you go ahead and read it, counsel.

Mr. Lanier:

"Cross Examination

Q. (By Mr. Jungroth): You have a full head of hair at the present time? A. Oh, yes.

Q. Now, I believe that you stated that you took the bobby pins out the next morning?

A. They are supposed to be left in to dry. We took——

Q. With the solution on?

A. I forget if it was left on or if you are supposed to wash out, or—I can't tell you now because I never saw another one after it. But your hair was supposed to dry with the pin curls in it.

Q. And you left yours over night?

A. As near as I can figure out, yes.

Mr. Jungroth: I think that is all.

Redirect Examination

Q. (By Mr. Lanier): At least regardless of whether your personal [249] memory recalls the details, you testified that you followed the directions? A. Yes.

Q. Did you or not follow the directions?

A. I did follow the directions.

Q. And if the directions state that after applying the solution, and then applying the neutralizer,

(Deposition of Mrs. Donald Carlson.)
and then thoroughly rinsing the hair that you leave them over night, is that to what you are referring?

A. Yes.

Q. Counsel has tried to imply that you left the solution itself in over-night, without rinsing. Is that correct or not? A. I didn't do that.

Q. In other words, all the solution was thoroughly rinsed out before leaving it on over night?

A. Yes.

Mr. Lanier: That is all."

Mr. Lanier: Would you take the deposition please of Mrs. Carl Carlson.

Whereupon,

DEPOSITION OF MRS. CARL CARLSON witness for the plaintiff, was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, before the Court and Jury, as follows: [250]

"Direct Examination

Q. (By Mr. Lanier): Would you state your full name? A. Mrs. Carl Carlson.

Q. And where do you live, Mrs. Carlson?

A. In Kensal, North Dakota.

Q. At Kensal? A. Yes.

Q. And that is in Stutsman County, North Dakota? A. Yes.

Q. The young lady who just testified on the stand and deposition previous to you, Mrs. Donald Carlson, is she your daughter-in-law?

(Deposition of Mrs. Carl Carlson.)

A. Yes.

Q. Donald Carlson being your son?

A. Yes.

Q. Now, calling your attention to sometime in March of 1955, did you have occasion, in the company of your daughter-in-law, Mrs. Donald Carlson, to be in the Rexall Drug Store in Kensal, North Dakota? A. Yes.

Q. And for what purpose?

A. To buy a Cara Nome permanent.

Q. And did you make such a purchase?

A. Yes. [251]

Q. And in your presence did your daughter-in-law make such a purchase? A. Yes.

Q. Will you tell me who applied your permanent? A. My daughter-in-law.

Q. And who applied hers?

A. She put her own in.

Q. Did you or not read the rules and directions for the application?

A. You must read them thoroughly because each one that you buy, if you buy different kinds, have a little different method of putting them in.

Q. And did you read them?

A. Yes, thoroughly.

Q. And did you or not meticulously follow those directions? A. Yes.

Q. And do you yourself specifically, as you now sit in the witness chair, remember the application of this particular permanent wave?

A. Well, I just couldn't get up and say just how.

(Deposition of Mrs. Carl Carlson.)

You have some solution you put on, and you pin curl, it's put in with a pin curl, and you have your solution to put on; later on it's thoroughly rinsed [252] with several waters to be sure to get all your solution out, and then you leave it dry thoroughly before taking your pin curls out.

Q. But you do remember the application of this application of this particular Cara Nome?

A. Yes.

Q. Do you recall whether or not you had the solution visible while this was being done?

A. We usually do it in the kitchen and the solution is on the Frigidaire.

Q. And do you know whether or not you meticulously followed the rules that were laid out for timing in the directions?

A. Yes, we did follow them correctly.

Q. Now, on opening the bottle of Cara Nome Rexall home wave, did you notice anything at all unusual about the odor?

A. Well, they all got a pretty hot smell.

Q. Nothing particularly unusual about this one that you noticed?

A. Well, you don't open them up and take a good whiff. They smell bad enough, and you usually push them to the side.

Q. Now, when the wave was being applied to your scalp and hair, did you notice anything at all unusual [253] about your sensations as it was being applied? A. Oh, it was stingy.

Q. Do you recall in this case that it was?

(Deposition of Mrs. Carl Carlson.)

A. Well, yes, I would say yes. It has a kind of a strong—if you get it too close, or it kind of burns.

Q. Do you recall such a sensation with the application and use of any other home wave solution?

A. Well, let's see, that was two years ago and I have had several others and I have noticed it to be that, well, in fact, we never went back to that brand.

Q. You have not noticed it, you say, in the others? A. No.

Q. Now, would you tell the jury what was the condition of your hair, and when, after the application of the Cara Nome Rexall home wave?

A. You mean when I took the bobby pins out?

Q. Yes.

A. Well your bobby pins were all rusty, and your hair, if you are going to comb them out, it was just like, well, you had two colors of hair. At the scalp of your head, if you are dark-headed where it is rolled up, why, it's a lot lighter, and it's just like, just like taking straw, and [254] when you comb your hair, why, your shoulders are just loaded with broken off short hair.

Q. Are you referring now to this particular Cara Nome Rexall permanent?

A. That's right.

Q. And what did eventually happen to your hair?

A. Well, I went, there is a lady in town here now, I just don't remember her name, and I had them cut off.

Q. This being Jamestown?

(Deposition of Mrs. Carl Carlson.)

A. Yes, and I had them cut off real short.

Q. About how long after the application of the home Rexall Cara Nome permanent was this?

A. Well, I had mine probably until the latter, latter part of April until I run it through because my daughter-in-law was at my home at that particular time, and like I told you, Dr. Martin was coming there and I left them a little longer, and then I had them cut off right shortly after that.

Q. Would that be between two and three weeks after? A. I would say yes.

Q. Prior to that time, and after the application and prior to cutting it, had you been able to do anything at all with your hair? [255]

A. Well, you pin curled it and you combed it out, and it didn't make any difference, you just had straw, and as you combed it each day it was just breaking off terribly.

Q. The hair itself? A. Yes.

Q. Have you ever had that experience with any other permanent?

A. No, I never had, and I had a lot of permanents.

Q. Have you ever used any bleaching substance on your hair? A. No.

Q. Any peroxide, anything of that type?

A. No, no type.

Q. To your knowledge, has your daughter-in-law ever so used?

A. No, her hair is always the same color.

(Deposition of Mrs. Carl Carlson.)

Q. Have you ever again used Cara Nome Rexall home wave? A. No.

Mr. Lanier: Your witness."

Mr. Lanier: Shall I proceed counsel?

Mr. Packard: Yes. [256]

Mr. Lanier.

"Cross Examination

Q. (By Mr. Jungroth): You have a good heavy head of hair at the present time?

A. Well, I wouldn't say they are real thick hair, but I have enough.

Q. You have plenty of hair on your head?

A. Yes.

Q. And you won't say that you have lost any hair because of a home permanent at this stage?

A. Well, probably if I had kept that on, or messed around with it long enough, maybe I would be in the same fix at the other was.

Mr. Jungroth: I think that is all.

Mr. Lanier: That is all. Thank you very much."

Mr. Lanier: Plaintiff rests again, your Honor.

Mr. Packard: I have a doctor coming at two, and I know he is pretty busy. I would like to ask Mrs. Nihill just one question.

The Court: Have her come up now them. [257]

Mr. Packard: Yes.

The Court: Mrs. Nihill, will you come forward please.

Whereupon,

MRS. JOHN NIHILL

recalled, resumes the witness stand for further cross examination, as follows:

Mr. Packard: You have been already sworn Mrs. Nihill. You may just have a seat.

Cross Examination

Q. (By Mr. Packard): Mrs. Nihill, have you ever been acquainted with Mrs. Carlson—either one of them? A. Yes, I know them.

Q. And when did you first meet them?

A. Oh, that would be hard to say.

Q. Are you related to them in any manner?

A. No, sir.

Q. Have you seen them socially?

A. Oh, yes.

Q. I take it, in a farm community that — I've heard in the deposition that Dr. Martin was over at their house one night and I take it you have those get-togethers or gatherings, and you see them from time to time, is that correct? [258]

A. Yes, we have community affairs.

Q. And I take it they are quite close friends of yours? A. Well, I wouldn't say that.

Q. But you do see them quite often socially?

A. In town, off and on, yes.

Mr. Packard: That's all.

Mr. Bradish: May I ask a couple of questions, your Honor?

The Court: Yes.

(Testimony of Mrs. John Nihill.)

Further Cross Examination

Q. (By Mr. Bradish): Did you ever talk with either of these ladies after Sandra got her cold wave?

A. After Sandra got her cold wave? You mean——

Q. About the cold wave and about Sandra's condition?

A. Well after Sandra had lost her hair, they volunteered the information about their permanent, yes.

Q. You were talking to them then at that time about Sandra's condition and about the cold wave. Is that right?

A. Well, yes, they knew the condition of Sandra's hair, yes.

Q. And that was all done before these depositions were [259] taken, wasn't it? A. Oh, yes.

Mr. Bradish: That's all.

Mr. Lanier: I have no questions.

Recross Examination

Q. (By Mr. Packard): When was it you first talked to the Carlsons about Sandra's hair?

A. Well you see we live in a little town; everybody kind of knows what's going on there, and after Sandra—well it isn't like Los Angeles. (Laughter.)

Q. I can appreciate that. I understand there's three hundred and fifty in the town, is that correct?

A. Yes.

(Testimony of Mrs. John Nihill.)

Q. And you are in a farm community, more or less, and people live on farms scattered around the town, is that correct? A. Yes.

Q. And so you all know each other fairly well?

A. Yes.

Q. In relation to the time you came back from Seattle—— A. Yes.

Q. (Continuing): Did you talk to them after you came back [260] from Seattle?

A. Oh, it was, maybe—let's see, I think it was—well we had occasion to go up there to get some cream for my mother-in-law——

Q. When was that?

A. It was about—I think it was in the Fall afterwards.

Q. In other words, that would be in the Fall of 1955? A. Yes.

Mr. Packard: That's all the questions.

Mr. Lanier: I have nothing Mrs. Nihill.

(Witness excused.)

The Court: The jury will be excused again. It's the noon hour, and you may separate under the injunction heretofore given, not to talk to anybody or permit anybody to talk to you about the case until you have heard all of the evidence and the arguments of counsel, and instructions of the Court, and be back ready for further service at two o'clock. You may pass.

(Whereupon, at 12:05 o'clock p.m., the hearing was adjourned until 2:00 o'clock p.m.) [261]

Afternoon Session

(Whereupon, at the hour of 2:02 p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

Mr. Packard: May I proceed, your Honor?

The Court: You may proceed.

Mr. Packard: Defendant will call Dr. Harvey Starr.

Whereupon,

DR. HARVEY E. STARR

called as a witness on behalf of the defendant, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to wit:

The Clerk: What is your name?

The Witness: Harvey E. Starr.

Direct Examination

Mr. Packard: Doctor, now please keep your voice up, so I can hear you back here and all the jurors can hear you. [262]

Q. (By Mr. Packard): Now, will you please state your full name, and your business or profession?

A. Harvey E. Starr; I am a physician and surgeon—M.D.

Q. Do you maintain offices in this city, doctor?

A. 1401 South Oak Street in the California Medical Building.

(Testimony of Dr. Harvey E. Starr.)

Q. And for what period of time have you maintained your offices at that locality?

A. Since 1939.

Q. Now, will you please state to the jury where you obtained your under-graduate education, doctor?

A. My under-graduate education was obtained at high school in Wyoming; Union (?) College in Nebraska; Walla Walla College in Washington. My medical education was obtained at the College of Medical Evangelists, Monalinda, Los Angeles.

Q. Now, Doctor, you are licensed to practice in the State of California, I assume, so will you please tell us the year in which you were licensed?

A. I was licensed in Oregon in 1933 and California in 1934.

Q. And after your graduation from medical school, did you take an internship? A. I did.

Q. Whereabouts did you take that internship?

A. At the Good Samaritan Hospital in Portland, Oregon.

Q. And after your internship, what did you do next insofar as your profession is concerned, doctor?

A. I was in service for awhile with the Indian Service at Warm Springs, Oregon, and I worked in the office of Samuel Ayers, Jr., a dermatologist in this City.

Q. And when was it that you went to work for Dr. Samuel Ayers, a dermatologist?

A. That was '34 and '35.

(Testimony of Dr. Harvey E. Starr.)

Q. Since that date have you limited your practice to any particular specialty or any branch of medicine, sir?

A. I've limited my practice strictly to the field of dermatology.

Q. That's since 1933 or '34?

A. Since 1939.

Q. Since 1939. Are you on the staff of any hospitals in this community?

A. On the staff at the California Lutheran Hospital; I'm on the Senior Staff, I should say.

Q. Now, doctor, do you belong to any medical society?

A. I belong to the Los Angeles County Medical Association; the California Medical Association; the American Medical Association; the Civic Post-Dermatological Association; the Hollywood Academy of Medicine. At [264] the California Hospital I am Chief of Skin Service, have been for the last three or four years and I am Assistant Clinical professor of Medicine and dermatology at the College of Medical Evangelists.

Q. In other words you teach at the College of Medical Evangelists and you are on their staff for teaching purposes?

A. That's right; I'm on the faculty.

Q. And what subjects do you teach?

A. Dermatology.

Q. Now, Doctor, you had an occasion at my request, I believe Monday, to examine the plaintiff Sandra Nihill. Is that correct?

(Testimony of Dr. Harvey E. Starr.)

A. That's right.

Q. And prior to the examination of Sandra Nihill, did you have an opportunity of acquainting yourself with her history before, or prior to, the examination?

A. Yes, I had the depositions which you gave to me and I read all of these depositions, studied the pictures, and——

Q. Generally familiarized yourself with the findings of her attending physicians and Dr. Michelson. Is that correct?

A. That's right. With Dr. Martin, I think it was, from [265] her home town, and then Dr.—I think it was Melton, at Fargo, and Dr. Michelson in Minneapolis.

Q. Are you acquainted with Dr. Michelson, sir?

A. I have met Dr. Michelson and we have contact once in awhile. If I have patients going to the Minneapolis area and they need care back there or going there, why I usually recommend them to Dr. Michelson and he in turn——

Mr. Lanier: One moment, if the Court please, I move an objection as being totally immaterial.

The Court: I think so.

Q. (By Mr. Packard, resuming): Dr. Michelson is one of the leading dermatologists in the world, is that correct?

A. I reckon Dr. Michelson is one of the leading dermatologists in the world.

Q. Now, at the time you examined Sandra Nihill, you then were familiar with the history of this case?

(Testimony of Dr. Harvey E. Starr.)

A. That's right.

Q. And did you take any further history from Sandra Nihill, or her mother, on Monday, which I believe, or Tuesday, I'm sorry, it's Tuesday I believe April 8th? A. It was Tuesday, that's right.

Q. April 8, 1958. Did you take a further history, doctor? [266] A. Yes.

Q. And would you please state what your history was at that time that you took?

A. One of the things that came to my mind in reading the depositions was what treatment Sandra had received for this condition, and I asked Mrs. Nihill about local applications. I was interested of course about even the shampoo that might be used, or being used, and I asked about local applications because I was interested if any oily materials had been used on the scalp because of the dryness of the hair and the scalp, and the only thing that I could elicit that we could say was really treatment, now the Breck shampoo has been used and as I understand Wildroot Hair Oil had been used, but Dr. Melton at Fargo had prescribed thyroid substance, and that had not been continued, and I asked Mrs. Nihill why and she felt that it was making Sandra thick through the hips and so she said she had her stop it. I asked her if Dr. Michelson prescribed any treatment and she said no.

The Court: She told you about the selsum? She told you about that?

The Witness: That's right. [267]

Q. And you were familiar about the selsum solu-

(Testimony of Dr. Harvey E. Starr.)

tion by the deposition too, is that correct, of Dr. Martin? A. That's right.

Q. Now, did you then conduct an examination of plaintiff, Sandra Nihill, doctor?

A. I checked Sandra, her scalp, of course, first.

Q. And what did you find insofar as your examination and findings at that time?

A. I was a little bit surprised to see that her hair was light because I expected to see it dark because of the original picture. I had pictured Sandra as being a brunette, but her hair is rather light and her mother told me that she was naturally a blonde; she certainly has nice blonde skin. The hair on her scalp is a good growth. The hair is of different lengths——

The Court: What kind of growth did you say, doctor?

The Witness: It's a good growth.

The Court: A good growth.

A. But it's dry and it's brittle, and I checked Sandra's eyebrows and she has eyebrows present, they are blonde, you can see those right at the edge of the eyebrow pencil and to my fingers, I ran it across the eyebrow [268] area, it felt like there was a fair growth of eyebrows. I checked the eyelashes. The eyelashes are not too heavy, and I commented on that and Mrs. Nihill told me that her eyelashes weren't too heavy either. I checked Mrs. Nihill's eyelashes but her eyelashes are heavier than those of Sandra. I don't know that that would be pertinent. Then I checked the axillary hair, the

(Testimony of Dr. Harvey E. Starr.)

hair on the arm-pit and the hair on the arm-pit had been shaved, but there seemed to be a fair field of hair growth there, and I checked Sandra's skin to see if there was any dryness, and I always feel that a good point to check for dryness of the skin is right on the extensors of the elbows, the points of the elbows, and Sandra's elbows are very dry and thick. I checked her fingernails. Her fingernails are not of too good quality, and she is a nail biter. I think that the nails go right along with our findings in these scalp or hair conditions because hair and nails have a similar structure.

Q. Now, doctor, as a result of the examination and findings you made on April 8th, and taking into consideration the history that you had obtained from the mother, as well as the history, treatment and findings that you had read in Dr. Melton, Dr. Martin and Dr. Michelson's depositions and their findings and lab tests and so [269] forth, taking all of that information, have you an opinion at this time of the condition from which Sandra is presently suffering?

Mr. Lanier: Object to it, if the Court please. No proper foundation laid and improper hypothetical question, not including everything that's necessary.

The Court: Overruled. He may answer.

Mr. Lanier: One moment, your Honor. That question is not based upon reasonable medical certainty.

The Court: Well that's true; you rather insisted

(Testimony of Dr. Harvey E. Starr.)

on that on counsel for plaintiff's attorney; I suppose you should include that in your question.

Mr. Packard: I'm asking this doctor, from his findings, his personal examination, as to whether he has an opinion of the condition from which she is suffering.

The Court: He can answer the question yes or no?

Mr. Packard: Have you an opinion?

The Witness: I have an opinion. [270]

Q. What is your opinion, doctor?

Mr. Lanier: Object to that as no proper foundation laid, your Honor.

The Court: Sustained.

Q. Have you an opinion, within reasonable medical certainty, doctor, of the condition from which Sandra is suffering at the present time? Just say yes or no? A. Yes.

Q. And what is your opinion, sir?

Mr. Lanier: Now, may it please the Court, may I ask one or two questions preliminary to a possible further objection?

The Court: You may.

Mr. Lanier: Thank you.

Questions by Mr. Lanier:

Q. Dr. Starr, how long was Sandra actually in your examining room?

A. About twenty-five minutes.

Q. How long did you actually examine her?

A. It would be about that same time.

(Testimony of Dr. Harvey E. Starr.)

Q. Your examination covers that, and that only, which you have, up to now, testified to? [271]

A. That is correct.

Mr. Lanier: That's all.

Q. (By Mr. Packard, resuming): Well, I'll ask one further question, but prior to the examination, had you completely read the testimony of Doctor—have you read any testimony of any Doctor, in connection with their care, treatment or examination?

Mr. Lanier: Objected to, as repetitious, your Honor.

The Court: He may answer.

A. I had read Dr. Martin's and Dr. Melton's and Dr. Michelson's report.

Q. You had read the entire report?

A. Read the entire report.

Q. Now would you please—there was an objection to the question——

The Court: I don't think so anymore.

Q. All right. Go ahead then. I am asking you, Doctor, to state your opinion as to the condition which Sandra is suffering at the present time, within reasonable medical certainty? [272]

A. Might I, your Honor, review in my mind how I arrived at——

Q. I'll ask you for your reasons after you tell me your opinion; give me your opinion, then I'll ask you to explain the reasons.

A. Well, there were two conditions to be considered. Maybe we should say three. No. 1, was

(Testimony of Dr. Harvey E. Starr.)
the complaint that this hair loss had been sustained, purely and simply, from the use of a permanent wave solution. No. 2, from the fact being brought forth, that the hair had been lost from the scalp, also from the eyebrows and the eye lashes, with probably sparse growth elsewhere, one would have to also think of either a congenital condition or a picture of familial type of hair distribution, or an alopecia areata; and (3), another commonly observed picture, fragilitis crinium, or simple dryness of the hair.

Q. Now, doctor, if I may interrupt, just before you go any further, I would like to state to you, assume further in your consideration and in the forming your opinion and in stating your opinion, that within the last week an examination had been made of the pubic area at which time the pubic area showed sparse hair with almost complete lack of hair in certain areas, assume that further in your consideration. Will you do that? [273]

The Court: Before you answer further, will you kindly give me that third condition? I couldn't follow you.

The Witness: Fragilitis crinium. Fragile hair.

The Court: Thank you.

Q. (By Mr. Packard, Resuming): All right, you can go ahead, doctor.

A. After having read the depositions and the opinions of the doctors, of course I went back to Dr. Martin's deposition that he saw Sandra and her hair was coming out. I think that Dr. Martin

(Testimony of Dr. Harvey E. Starr.)

said that he saw Sandra once, that would be in February of that year that she had the permanent, and then he saw her again that summer. Now, on the occasion of the first visit he had prescribed selsum suspension, and he had found Sandra's hair dry, and some scale, and I feel that Dr. Martin was correct in his feeling there because so many time so-called seborrheic dermatitis will have its onset at puberty. There is an over-activity of the oil gland, and we see many of these individuals and adolescents breaking out with black-heads and pustules with so-called acne eruption. And associated with it of course is an oiliness of the scalp, and so-called dandruff, and the scalp can itch [274] and be unbearable and people can scratch it and they can get secondary infection. Now, while the scalp is oily, the hair at the same time may become quite dry and brittle, which gives us the picture that we see so many times in seborrheic dermatitis, and in this condition, if it is allowed to go on and on, it can give rise to recession of hair in the forehead area and a bald patch like I have on the back of my head. So, I feel that Dr. Martin's assumption that this could be a seborrheic dermatitis could be correct. I do not have any way of knowing whether he was told or was notified that Sandra had had a permanent wave, using a cold wave solution or not——

Mr. Lanier: May it please the Court. I'm going to interrupt at this point, after having listened for

(Testimony of Dr. Harvey E. Starr.)
quite a while, and move now that all of this testimony be stricken as not responsive.

Mr. Packard: I think, your Honor, he is explaining his opinion, which he has a right to do as a medical expert.

Mr. Lanier: Please the Court, it's well established that one doctor can not establish and base his opinion upon the opinion of another doctor.

Mr. Packard: He may use that as case history. Counsel did it himself with Dr. Levitt. He asked Dr. Levitt, "Did you read these depositions", "Did you familiarize yourself with those pictures", and so forth. This is certainly proper on the basis of a——

The Court: I'm inclined to think Mr. Lanier is right, Mr. Packard, to the extent that he shouldn't base his testimony on the opinions of the other doctors, and the findings of the other doctor I think it's perfectly right for him to take——

Mr. Packard: Are you basing your opinion—pardon me, your Honor. I'm sorry.

The Court: I think that he should not base his opinion on their opinions, but rather on the findings that are disclosed by the depositions and by his own examination.

Q. Now, let me ask you this, doctor, to go back, so we understand each other, and progress here with rapidity, do you in any wise base your opinion as to the condition from which Sandra is suffering at the present time upon any of the opinions of any

(Testimony of Dr. Harvey E. Starr.)

of the other doctors whose depositions you have read? A. No. [276]

Q. What do you base that upon?

A. The inspection that I made on Tuesday.

Q. Did you use the history of the other doctors insofar as their clinical findings are concerned and the history they took for the purpose of assisting you in arriving at your opinion?

A. Yes, I would certainly say that.

Q. Now, will you please state to us—give us what your opinion was insofar as the condition from which she is suffering at this time—your opinion?

Mr. Lanier: Objected to, if the Court please, upon the grounds there is no proper foundation laid.

The Court: Overruled.

A. We have the history that the hair fell out——

Q. Let me interrupt you just for one second. Tell me what your opinion is and then I can ask you to explain how you arrived at that opinion?

A. My opinion is this is a case of fragilitis crinium.

Q. And what are your reasons—you can state to me now all the reasons that you considered in arriving at this diagnosis. So now you can explain what your reasons are.

A. Fragilitis crinium is rather a common condition. The [277] hair is dry and is of uneven length; it's fragile, so that it breaks off. That's why the hair has that sort of uneven appearance.

(Testimony of Dr. Harvey E. Starr.)

There may be a light amount of scale on the scalp. The skin of the body is generally dry and we do know that there are, with people who have this condition, usually have underlying, and underlying physiological explanation for it.

Q. Now what do you mean by an underlying physiological explanation, doctor?

A. Well one of the most common things, of course, that we find underlying this condition is a hypothyroid state.

Q. What is a hypothyroid state?

A. Hypothyroid? Under-activity of the thyroid gland.

Q. And what does under-activity of the thyroid gland produce or cause in the human body?

A. Well, of course, there's a varying picture, depending upon probably the severity of the condition but, by and large, people who suffer from this condition are underweight, not always so; they have dryness of the body skin, especially of the scalp, there can be sparse hair growth, the nails can be of poor quality, and so the picture can go on to where it even can go over and affect the mental picture, a person may not be as sharp as usual. [278]

Q. Now, doctor, did you consider, in arriving at your opinion, the condition of alopecia areata?

A. Yes, I did.

Q. Did you, in connection with alopecia areata, make a differential diagnosis, in arriving at fragilitis crinium? A. That's right.

(Testimony of Dr. Harvey E. Starr.)

Q. And what is the differential diagnosis?

A. The onset, of course is sudden, in alopecia areata, and usually the hair comes out in discrete areas, so that we have distinct bald patches. Those areas from which the hair has disappeared are perfectly smooth, they show no signs of inflammation whatsoever. The hair just vanishes, that's all. Now the cause of alopecia areata still remains undetermined and it can be seen in almost any range of life. It is most frequently seen between the first and third decades of life.

Q. Do you see it in children of tender ages?

A. Yes; there have been cases of alopecia areata reported in individuals as young as fifteen months.

Q. Now, insofar as your diagnosis of fragilitis crinium, did you form an opinion as to what was causing this particular condition? [279]

Mr. Lanier: Objected to as no proper foundation laid, your Honor.

The Court: Overruled. That can be answered yes or no, doctor.

A. Yes.

Q. And will you please explain what, in your opinion, were the cause or causes of this condition?

Mr. Lanier: Same objection; there's no foundation, your Honor.

The Court: Overruled.

A. We know, for instance, in local care of the scalp, that a person can produce a dry scalp, dry hair, by using strong soap solutions, say in sham-

(Testimony of Dr. Harvey E. Starr.)

pooing the scalp every day. A person with a normal scalp or a normal head of hair could produce in themselves a dry, brittle hair by just local care, that's why local care becomes important for consideration, and in fragilitis crinium, of course we are also interested in those underlying physiological causes. Now, we've already mentioned thyroid activity. Vitamin A has been shown to be of definite influence on the degree of oiliness and fragility of the hair. Estrogenic substances are also important, and iron metabolism is certainly important. People who have a secondary [280] anemia may begin to present this type of a picture. We see this type of a picture sometimes, not too uncommonly, in pregnancy and, there of course, iron is indicated as a medication for this patient. Now with those various physiological causes, taken into consideration, the condition of fragilitis crinium can certainly be improved.

Q. Now, Doctor Starr, we have here a diagram, which has been marked "A" for identification. This is a hair, the red part, I believe, is the part that is non-vital—it's a hair shaft—maybe I shouldn't use the term "non-vital", but it's a hair shaft, "epidermis", "dermis", "fat gland", and so forth. Now, insofar as the present hair growth in Sandra's head is concerned, is that growth, as far as the bulb, alive, in a bulb, the hair can be reactivated, in your opinion?

Mr. Lanier: Objection of the court please, it's leading, no foundation laid.

(Testimony of Dr. Harvey E. Starr.)

The Court: If he has an opinion he may give it.

A. If a hair is present, it certainly is growing and it's viable. When there is no hair, we might assume that that pappila, which is really the germ center for hair growth, may be destroyed, but we can go back to [281] alopecia areata again. We can have alopecia areata where we can have a perfectly smooth area on the scalp. It doesn't look like—there's no hair out above the surface of the skin, and yet alopecia areata that hair will come back. The only way you could prove that, of course, would be by taking a piece of the tissue and examining it. Now, Dr. Melton did do a biopsy in Sandra's case.

Q. And what did that show?

Mr. Lanier: Objected to, if the Court please,—hearsay.

Mr. Packard: It's in the record.

Mr. Lanier: The deposition speaks for itself, your Honor.

Mr. Packard: Well, then, I don't want to take the time, I'll—I think, your Honor, it's just wasting the time of the Court, I can ask the doctor——

The Court: Well, perhaps you better get the deposition in view of the objection.

Q. (By Mr. Packard, resuming): (Reading from deposition of Dr. Melton) "A biopsy of the scalp was reported. Sections show somewhat keratinized stratified squamous [282] epithelium which is everywhere composed of mature and well differentiated cells". Now, what does that mean?

(Testimony of Dr. Harvey E. Starr.)

A. Well, we have a skin here and, of course we have a follicle opening. Right here is the follicle opening, (Witness is demonstrating by the use of the diagram marked Defendant's Exhibit A for identification), this is our normal horny layer of the skin. Now, it's rather interesting that keratin, which is an albumen-like subtance, one of the so-called fibrous proteins, makes up the outer surface of the skin, but also makes up our hair and nails. This is normal skin here and as this hair grows outward this shape planning grows right along with the hair and when it comes up here to the opening of the sebaceous glands for the contents of the glands to put out, those cells also intermingle with that and come on out. In your acne cases, where there is obstruction of this follicle opening and we have retention of cellular or fat material in the sebacious glands or from the cellular activity, they block up and give us the black-head or our little——

The Court: Are you explaining the answer that the doctor gave?

The Witness: Yes, I'm trying to give it right now.

The Court: All right. [283]

A. (Continuing) In certain conditions, like alopecia areata, or even in fragilitis crinium, we find that the size of the sebaceous gland is lessened. In other words, sometimes you could even speak of it as atrophy, but it is lessened, and in the case of seborrheic dermatitis, you will find evidence of

(Testimony of Dr. Harvey E. Starr.)

definite inflammation around this follicular opening because that's where the inflammation takes place in seborrheic dermatitis. It will show an inflammatory picture at that time.

Q. And is that what was explained——

A. Now, by Dr. Melton's biopsy, he said that, in his report, that there was a diminution in the size of the sebaceous glands.

Q. And that is the gland that throws off oil, is that correct?

A. That's right. Now his findings there, of course, substantiate two things, that there could be an alopecia areata or a fragilitis crinium.

Q. In other words, the natural oil going to the hair would come from that fat gland, is that correct? A. That's right.

Q. And there had been a diminution or lessening in the size of that fat gland, is that correct?

A. When the gland was diminished in size, of course, its volume of output is going to be less, that's all. [284]

Q. Now, have you an opinion as to whether the diminution in size of a fat gland could be caused by the application of an external solution, or chemical?

Mr. Lanier: Objected to; there's no foundation laid, your Honor.

The Court: He may answer.

A. The scalp or the skin itself is quite impervious to the passage of fluids or liquids. We all know that by standing in a shower and bathing ourself,

(Testimony of Dr. Harvey E. Starr.)

that our skin and scalp is quite impervious because the water doesn't get through into those openings and get below the surface of the skin. There can be absorption by the use of ointments, and we know in the case of hair dyes that sometimes there has been adequate absorption directly through the skin, probably enough that it could produce damage. For instance, one of the old treatments was the use of mercury ointment rubbed onto the skin, so it would absorbe it through the skin, but a solution would have to certainly be in contact with the body for a considerable period of time to produce an effect.

Q. And to produce an effect, would you expect the person receiving this effect to have some sensation of feeling of the solution on their head, if there was a chemical reaction or a chemical burn taking place? [285]

A. If there was a chemical burn, yes; if there was a hypersensitive state, yes; but a person still could have some absorption of a substance and not be aware probably that it was being absorbed. I don't think that that would always have to stand, that they would be aware that something was being absorbed through the skin. It could happen without them being aware of it.

Q. Have you an opinion as to whether the application of a cold wave permanent, assuming the same to be within normal limits of those usual home wave kits, assuming that one application was given of a cold wave solution to the hair and the solu-

(Testimony of Dr. Harvey E. Starr.)

tion came into contact with the skin, would you have an opinion as to whether such an application would cause damage to any underlying tissue?

Mr. Lanier: Objected to. No foundation laid, your Honor.

The Court: He may answer if he has an opinion.

A. I have an opinion.

Q. And what is your opinion, doctor?

Mr. Lanier: Same objection, your Honor.

The Court: He may state his opinion.

A. Everyone in the field of dermatology have seen patients [286] who have used cold wave permanents which came into vogue about four or five years ago, about '52 I guess it was, and we have all had patients that come in complaining of dryness of their hair because they abuse the cold wave, and some of these cases of dryness have been pretty severe, but in my experience all of these patients have recovered their normal hair growth. The application of an emmolient, an oil, to the hair and using an oily shampoo for cleansing and after a period of time, aside from the time when they are inconvenienced by the cosmetic unsightliness of the dry hair, why their hair returns to its normal healthy state.

Q. What is your opinion, doctor, insofar as to whether the application of a normal solution, would it damage any of the underlying tissues, in your opinion? A. No.

Mr. Lanier: One moment, doctor. I move the

(Testimony of Dr. Harvey E. Starr.)

answer be stricken to give me time to state an objection.

The Court: It may be stricken for you to state your objection.

Mr. Lanier: Objected to, there is no foundation laid, your Honor.

The Court: He may answer. [287]

Mr. Packard: The answer is already in, I think, your Honor.

Q. Now, doctor, have you, in your practice, treated these people that have had damage to their hair, such as dryness by reason of home permanents? A. Yes.

Q. And have you in your practice ever had any case where a person had suffered permanent loss of hair, permanent damage to the hair, by reason of the use of a home cold wave permanent?

A. I have not.

Q. And do you know of any ever having been reported?

A. I know of no cases having been reported where hair loss was permanent from the use of the home cold wave.

Q. Now, doctor, have you an opinion as to whether the plaintiff, Sandra Nihill in this case, through the proper medical supervision, treatment and care, could in your opinion, within reasonable medical certainty obtain a normal regrowth of hair—do you have an opinion?

A. I certainly do.

Q. What is your opinion, doctor?

(Testimony of Dr. Harvey E. Starr.)

A. With my opinion being that this is a fragilitis crinium I feel that, were I treating Sandra, I would want to know right away again about her thyroid state. That [288] could certainly be rechecked by a basal metabolic test although we have our clinical evidence to guide our feelings therapeutically. No. 2, I would certainly want a blood count to see what her—and a hemoglobin estimation, to see what her blood picture was. Now, knowing that Vitamin A is beneficial in these type of cases, and for dry skin, I would right away start administration of Vitamin A, and the thyroid dosage of course would be decided by the degree of minus metabolism that she might show, and then a proper blood builder or iron-fraction containing substance administered. And locally, I would see that she only shampooed the scalp once a week, using an oil or a cream shampoo and using an oily dressing on the scalp at daily intervals.

Q. And with that treatment, have you an opinion as to whether she would——

A. I have a reasonable feeling that Sandra would show——

Mr. Lanier: One moment, doctor. Object to it, there is no foundation laid.

Q. Have you a reasonable opinion, based upon reasonable medical certainty that she would have a re-growth of hair?

Mr. Lanier: Same objection, your Honor. [289]

The Court: He may answer.

(Testimony of Dr. Harvey E. Starr.)

A. I have a feeling that Sandra would have nice results.

Mr. Lanier: I move the answer be stricken, your Honor, as not being responsive——

The Court: Overruled. It may stand.

Mr. Packard: You may cross-examine.

Cross Examination

Q. (By Mr. Lanier): Just one question which didn't come out in your background, doctor, you did not state whether or not you had passed the American Board of Dermatologists?

A. I am not a Board Member.

Q. You are not a Board Member?

A. That's right.

Q. Is not that the standard way to become known as a specialist, as a dermatologist?

A. I think it is at the present time.

Q. So, at the present time at least, you do not have the accepted rating of a dermatologist?

A. If I was not so accepted, I would not be on the faculty of an approved Medical School. [290]

Q. But you are not accepted as such by the American Board of Dermatology?

A. I have never applied for the Board.

Q. Thank you. And now you have also stated that you do rate Dr. Michelson as one of the top outstanding dermatologists in the United States?

A. That's right.

Q. Probably one of the three or four, is he not?

A. Well, of course, America is blessed; we have

(Testimony of Dr. Harvey E. Starr.)

a good many outstanding dermatologists, but certainly Dr. Michelson is one of them.

Q. Thank you. You would be a little bit hesitant, would you not, doctor, to be completely contrary to his opinion?

A. No, I think any of us that have had experience in the field are justified to have our own opinion regardless of who gives it.

Q. All right. What time, doctor, did Sandra Nihill come to your office on Tuesday of this week?

A. At five minutes to one.

Q. And how long did you have her wait?

A. Well I don't know how long she waited out in the reception room, but we brought her into one of the examining rooms around five minutes to one. Our starting time there is at one o'clock, and I tried to get [291] Sandra in just a little bit ahead of our starting time for seeing patients.

Q. And what time did she leave the examining room?

A. I think it was about one-twenty-five.

Q. And that concluded your examination?

A. That's right.

Q. She was examined by you at the request of whom? A. Robert Packard.

Q. Now, as a result of that examination, you gave Mr. Packard a report, I presume, before you came on the stand, did you not?

A. That's right.

Q. And the report that you gave Mr. Packard was first transmitted to him when?

(Testimony of Dr. Harvey E. Starr.)

A. Well I gave Mr. Packard——

Mr. Packard: Well, now, just a moment. I think you should ask him if the report was written or oral.

Q. (Mr. Lanier, resuming): Well let's start there then, did you give Mr. Packard a written or an oral report?

A. I gave him an oral report.

Q. You gave him an oral report. Have you ever given him a written report? A. Yes.

Q. All right. Now, when did you give him the oral report? [292]

A. I gave him the oral report Tuesday night.

Q. Tuesday night. Do you remember approximately what time?

A. It was after I returned from the office; it was probably around eight-thirty.

Q. Was that P.M.? A. P.M.

Q. About eight-thirty p.m. When did you give him the written report?

A. I gave Mr. Packard the written report after I had read the depositions.

Q. And that would be sometime the next day, would it?

A. No, that was back about probably three weeks or so ago; three or four weeks ago.

Q. About three or four weeks ago?

The Court: You gave him the written report earlier than you gave him the oral report?

The Witness: Yes. I gave him my opinion of what all these depositions meant.

(Testimony of Dr. Harvey E. Starr.)

Q. So you gave him a written report three or four weeks ago, before you had ever examined or seen Sandra Nihill? A. That's correct.

Q. And from the time that you examined her, at about one o'clock on Tuesday of this week, you did not give him [293] any report of that examination until eight-thirty that evening?

A. That's right.

Q. So if, at ten minutes after three, Tuesday afternoon, in this court-room, Mr. Packard stated to this jury what you would testify to, as a result of that examination——

A. Maybe I should say too Mr. Packard did call me, after I had examined Sandra. He probably called me, it was about maybe ten of two, that day.

Q. Oh, there was an oral conversation before eight-thirty?

A. Yes, there was, that was on the 'phone.

Q. That's one you forgot?

A. I had forgotten that.

Q. What time was that?

A. That would be about ten of two, I think.

Q. Ten minutes to two. A. Umhum.

Mr. Packard: You had to wait in chambers——

Mr. Lanier: Do you want to testify, counsel; I'll be glad to put you up there.

Mr. Packard: I'll testify to that fact. [294]

Mr. Lanier: All right, counsel.

The Court: Proceed.

Q. (By Mr. Lanier, resuming): Now, in your

(Testimony of Dr. Harvey E. Starr.)

examination, you examined the hair and scalp, the eyebrows and the eye lashes and the axillary hair, under the arms? A. Yes.

Q. No more? A. That's right.

Q. And you made no pubic examination?

A. I made no pubic examination.

Q. And prior to knowing of any pubic examination, made by Dr. Levitt, your opinion originally was based without that examination—correct?

A. I felt that I had seen adequate to confirm my diagnosis and for that reason I didn't feel that an examination of the pubic area was of particular interest to me.

Q. Even though the hair under the arm was shaved? A. That's right.

Q. And, as a matter of fact, it makes no particular difference in your diagnosis now, does it?

A. No, I don't think so.

Q. And it's your testimony that there's a fair growth of eyebrows? [295] A. Yes.

Q. Now, you also stated, doctor, that one of the things you are interested in, was the dryness of the skin, and that you thought that one of the best places to check that was the elbow. Isn't that the place where we are usually going to find most dryness?

A. No, I don't think so necessarily, but when we find patients that have marked thickening of the skin overlying the extensors of the elbows, it's a pretty good denominator that they have dry skin, or

(Testimony of Dr. Harvey E. Starr.)

that skin area if it wasn't dry, it would be pliable and soft.

Q. And if I have that condition on my elbows I have dry skin?

A. Well you would certainly have to have it in other areas. She has it in her scalp, her whole scalp is dry.

Q. How about the examination of her body skin, as a whole doctor?

A. The skin of her fore-arms, the skin seems to be on the dry side.

Q. What do you mean by the dry side?

A. Well, when a skin is oily you can certainly feel the oil on it, can't you?

Q. I'm not answering questions, doctor.

A. You feel the feel, when you run your finger over a skin that is oily, you feel the skin, it has that film [296] on; if it's dry it feels dry, it has a dry feeling just like it had been freshly, newly, washed.

Q. You felt Sandra's arms and felt that that was lacking? A. That's right.

Q. How about the shoulders?

A. Same way.

Q. How about the back?

A. I didn't go down the back.

Q. And you don't testify as to that?

A. No.

Q. Now, I want an explanation of what you mean, doctor, when you say that fingernails are not of good quality. What do you mean by good quality fingernails?

(Testimony of Dr. Harvey E. Starr.)

A. Well a nail that is growing usually has a nice margin at the free end. The nail has a good color and as you feel of it, it has a firm bed. Now, with Sandra's nails, they have a feeling of being thin. If you press down on the nail, they are not like my nail, hard, firm, the free margin is gone on all of the nails and they have a—you would feel better if they had a heavier body to them.

Q. You would feel better? A. Yes.

Q. Does free margin have anything to do with biting them off? [297]

A. It could be that being a nail-biter keeps those down, but still at the free margin, they are not that thickness that a nail of good structure should be.

Q. Do you think that it's normal that a young girl thirteen years old or sixteen, that lost all of her hair, might be a nail-biter?

A. I think that nail-biting is considered as a nervous manifestation regardless of age.

Q. And don't you think that that would be something that might create a nervous condition in a girl?

Or aren't you willing to concede that?

A. So many things can enter in to what might make a person tense and give an expression, certainly I will concede that; when a person is biting their nails, that certainly is a manifestation that they have a nervous tension.

Q. All right. Now, doctor, in a girl sixteen years of age would you expect her nails to be as heavy and as thick as yours?

(Testimony of Dr. Harvey E. Starr.)

A. No, I wouldn't expect them to be as heavy and as thick as mine.

Q. Would you expect a girl of sixteen, or any girl, to have as thick nails as a male?

A. No, but I would expect her to have a good nail, and when I find a nail that is not of too good quality and hair that is not of too good quality, I feel that the two [298] conform to the same pattern. That's why I check the nail, they are of the same structure.

Q. At least that's as much explanation that you can give me on the bad quality of her nails?

A. That's right. I wouldn't say "bad quality" either. They could be sturdier, but I wouldn't say bad quality.

Q. All right. Now, then, they are not bad quality, doctor? Correct? A. That's right.

Q. Now, doctor, on direct, you gave three possible causes, from your examination and opinion as to the case history of Sandra's present condition. One of them, you stated was a condition of what you called fragilitis crinium, is that it?

A. (Nods head affirmatively.)

Q. The other alopecia areata, and the third, I never did get. You started off with three and I never did get the third. What's the third possibility?

A. The third possibility was the condition that would be here and could be kept going by improper care of the scalp or lack of treatment.

Q. What would you call it?

(Testimony of Dr. Harvey E. Starr.)

A. Well, for a better name, let's just say inattention, or lack of treatment to this condition. [299]

Q. A condition originally caused by the home wave solution?

A. Well, let's accede that this started with the home wave.

Q. You admit at least that that's a possibility?

A. No, I'm just saying let us start with that.

Q. Do you admit that's a possibility, doctor?

A. We know that when home wave solutions are used——

The Court: Can you answer that yes or no, doctor?

The Witness: Then I would have to say no, the way this was stated, your Honor.

The Court: You say no then and let him ask further.

Q. (By Mr. Lanier, resuming): Would you tell me, doctor, that you don't see cases of loss of hair caused by home waves? A. I so testified.

Q. And that is your testimony yet?

A. That is my testimony.

Q. So that could be the condition which started it, is that correct?

A. That wouldn't be fair to answer on that question as it is so stated.

Q. Why wouldn't it, doctor?

A. Because we don't know what the picture of Sandra's scalp might have been before this home wave was applied. [300]

Q. You haven't read the deposition of Dr. Martin——

(Testimony of Dr. Harvey E. Starr.)

A. Nobody saw Sandra's hair. No doctor saw Sandra's hair before the home wave was given.

Q. All right doctor, I think that satisfies me.

Now, doctor, also you implied, you never did get on with it, that you said something, you at least used the term "congenital condition." Now what did you mean by congenital condition might have been causing this?

A. Well in the field of alopecia—and we have many alopecias of course—one of these alopecias of course is so-called congenital, and here of course we can have individuals born without hair on certain areas of the body that normally would produce hair, and sometimes we have a pattern of hair distribution that is familial.

Q. When you speak of congenital, doctor, you speak of from birth, do you not?

A. That's right.

Q. Is there anything in the case history of this girl that would make you put that conclusion in the case?

A. The only reason that that was brought in sir, was because when I checked Sandra's eye lashes Mrs. Nihill said that she also had some scanty eye lashes herself, and the only reason I mention that is because there can be a familial tendency for hair distribution. [301]

Q. Well, you certainly rule that out of any consideration in this case? A. Yes.

Q. All right. Now, doctor, one of your principal statements, and testimony, for diagnosis of fragi-

(Testimony of Dr. Harvey E. Starr.)

litis crinium, instead of alopecia areata — at least which you state—is because of a hypothyroid state. Correct?

A. No, I wouldn't say it that way sir.

Q. All right, let's see, that was your testimony. Let's see how you would say it, what is your principal reason then?

Mr. Packard: I object to that; that's not his testimony.

The Court: I think you are a little bit out of order in stating what his testimony was and leaving it so. Of course, the jury will be the judge of that. That remark may be stricken.

Mr. Lanier: All right, your Honor.

Q. (Mr. Lanier, resuming): Now, doctor, let's get your reasons right now for your diagnosis of fragilitis crinium?

A. We know that in fragilitis crinium, by observation of these cases and study of these cases, not just one but hundreds of them, by many independent observers, that [302] there are certain underlying physiological causes which, if you are going to have successful treatment in this case, they must be given attention to, and I mention hypothyroid——

Q. I am not asking about treatment, I'm asking you about your diagnosis of fragilitis crinium—why?

A. All right, the picture of fragilitis crinium is a dry scalp and dry hair, and the hair is fragile. It breaks off, it's of different lengths and it doesn't grow out like a normal head of hair. Sometimes

(Testimony of Dr. Harvey E. Starr.)

these individuals can even feel like it's parasitized and they may brush it, thereby increasing the damage that is already there, augmenting the hair breakage that is already present.

Q. Is that your only reason?

A. That's right.

Q. No other reason?

A. Of course I had the depositions and the findings of the other doctors. If Sandra was a patient of mine, say as of now, I would certainly want to put her through these various tests again to see that they were substantiated.

Q. Now, doctor, would you tell me, in a fragilitis crinium situation, would you tell me (1) the clinical tests that are standardly made. Maybe I better reframe that doctor. First of all you feel that one of [303] the treatment would be thyroid—correct?

A. That's right.

Q. If there is bodily need for thyroid?

A. One, yes. If you have clinical signs that indicate a hypothyroid state.

Q. All right. Now, then, in order to ascertain that, what is one of the clinical tests that you would make, standard?

A. All you would have to do is No. 1, inspection.

Q. Inspection?

A. Dryness of the skin and scalp.

Q. You don't make any clinical tests?

A. Are you referring to a clinical test or to a laboratory test?

Q. Laboratory test.

(Testimony of Dr. Harvey E. Starr.)

A. All right, that's different.

Mr. Packard: There's a difference between — I think the record should be clear between clinical and laboratory. I think he has been confusing the doctor when he says "clinical."

Mr. Lanier: Highly possible counsel.

Mr. Packard: All right. [304]

Q. (Mr. Lanier, resuming): What laboratory tests would you make?

A. The laboratory tests would be the protein-bound iodine determination and a basal metabolism test.

Q. Two of them—they're about the same, aren't they, doctor? A. No, I don't think so.

Q. Now, doctor, would you tell me, in your opinion, that if a radioactive iodine test was taken and was normal, that there could be thyroid difficulty?

A. The radio iodine uptake has become a fairly standard procedure in those cases in which we think of adenoma of the thyroid gland, but I see no reason for it to be used where we don't suspect the presence of an adenoma.

Mr. Lanier: I move the answer be stricken as not responsive, your Honor.

The Court: Overruled. It may stand.

Q. Will you tell me, doctor, whether or not, if a radioactive iodine test is normal it indicates any need for thyroid?

A. If I saw the clinical——

The Court: Answer the question doctor.

A. I would say no.

(Testimony of Dr. Harvey E. Starr.)

Q. All right. And you took none. [305]

A. No, of course not.

Q. Then if you are basing your opinion upon the case history in this girl, you must presume that the iodine test was normal—correct?

A. I only have the report as read by Dr. Melton.

Q. Dr. Melton?

A. But that does not override my findings from a clinical inspection.

Q. In your opinion? A. That's right.

Q. All right, doctor. Your second reason indicating a hypothyroid state, was that the people are underweight. Doctor, in your opinion, is Sandra Nihill underweight?

A. I didn't say that, I said overweight.

Q. Well, doctor, you might have, that's what I was wondering.

A. I said sometimes underweight but as a rule overweight.

Q. All right. Now let's get that straight again now. You say sometimes underweight, but now you say as a rule overweight.

A. I said as a rule they were overweight, I am sure I answered it that way.

Q. All right, and sometimes underweight?

A. Sometimes they can be underweight. So, that you just can't always go upon obesity and thinness [306] in determination for a hypothyroid state.

Q. No. 3, doctor, was that you expect a retarded mental condition. Do you find that in Sandra?

Mr. Packard: Now, I object. That was not the

(Testimony of Dr. Harvey E. Starr.)
testimony "that you expect," he said it's possible. Counsel is misstating the evidence, assuming facts not in evidence and I submit it's misleading, it's misleading the jury, and the doctor, the way these questions are being framed.

The Court: If the doctor noted that as one of the factors, I suppose he would have a right to ask if he found it present here.

A. There certainly was no evidence in Sandra that she was mentally sluggish or mentally inadequate. And when I made that comment, I think the question was asked to what extent hypothyroid conditions could go and I said that a hypothyroid state could of course range from the mild to the severe.

Q. But that is one of the things you look for?

A. In a severe state, certainly we do find it. For that matter you can find mental pictures in the hyperthyroid state too, so if I in any way inferred that we were looking for mental aberrations in Sandra, I certainly am sorry because I certainly wasn't looking for that in Sandra, nor did I anticipate seeing it. To me, she [307] is just a fine girl and I didn't find any of that sort of picture at all.

Q. All right, doctor. I want to know, when we speak of a hypothyroid state, we are speaking of an extreme thyroid state, are we not?

A. No, sir. If you said an extreme thyroid state, would you mean an extreme hypothyroid or would you mean an extreme hyperthyroid state?

Q. Well, doctor, doesn't hypothyroid itself ex-

(Testimony of Dr. Harvey E. Starr.)

press an extreme state and a condition of a thyroid deficiency?

A. No. Many people have a mild degree of hypothyroidism all their life and go through life probably without recognizing that fact.

The Court: Do you use two words there, doctor, one hypo and one hyper?

The Witness: Yes, sir.

The Court: Well, now, which——

The Witness: Hyper is above and hypo below.

The Court: Which would you say is the type that—— [308]

The Witness: In the hair-effected cases you find the hypothyroid, inactive.

Q. (Mr. Lanier, resuming): Inactivity?

A. That's right.

Q. And when you find that case, doctor, to the extent of where it causes loss of hair, it is in an advanced stage, is it not?

A. I wish that our medical experience could be so definitely answered. When we find patients that show a dryness of the skin, that may be only one of the manifestations. Now——

Q. Doctor, could you please just answer my question and answer me if loss of hair itself only appeared——

A. All loss of hair isn't due to hypothyroid states, Mr. Lanier.

Q. But if it can be caused by hypothyroid states, doctor, isn't that an extreme case?

A. No, sir.

(Testimony of Dr. Harvey E. Starr.)

Q. That could be an early stage?

A. It could be moderately mild stage.

Q. Moderately mild? A. Yes.

Q. It would not be early?

A. It could have been manifesting itself, maybe for a few months. These things can't be just tied down,—this is this and this is this, clinically. [369]

Q. That's one of the things I'm trying to point out, doctor. Thank you. Doctor, you have stated to the jury that the causes of alopecia areata are unknown. Basically speaking, that's one of the things, medically, with alopecia areata, is it not?

A. The cause of alopecia areata remains unknown.

Q. Now, however, there is one accepted cause. Is there not?

A. There is one condition on which many dermatologists feel that there is definitely an expression or a factor.

Q. And what is that, doctor?

A. We see so many times, in individuals in which there has been a death in the family or maybe a financial reverse, divorce proceedings, some strong emotional stress, an alopecia areata can manifest itself. Away from that, substantiating—or the feeling that the neurogenic factors are so important in this, of course is the fact that every once in awhile we have very young individuals who have shown alopecia areata manifestations — classical manifestations, so that it would be hard to put them under the neurogenic factor.

(Testimony of Dr. Harvey E. Starr.)

Q. You don't feel that the loss of hair, total loss in a [310] young girl, could ever be put in that category?

A. When I see a patient with alopecia areata, I always inquire into many of the stresses that they may have been going through. I feel they should be considered.

Q. You feel they should be considered?

A. I certainly do.

Q. And there is no question that alopecia areata occurs most often, doctor, in the first and third decades of life, between ten and thirty? A. Yes.

Q. Doctor, you state that you are familiar with Dr. Michelson's deposition? A. Yes, sir.

Q. And did you read the following questions and answers of Dr. Michelson——

Mr. Packard: Just a moment. This isn't in evidence as yet.

Mr. Lanier: If the Court please, he has been examining direct upon Dr. Michelson's deposition.

Mr. Packard: All right. Where are you reading?

Mr. Lanier: Page 14.

The Court: I would think, Mr. Packard, that under the circumstances, [311] that he should be permitted to ask, as long as you stick to the findings rather than to opinion.

Mr. Packard: Where are you reading from?

Mr. Lanier: Page 14.

Mr. Packard: Whereabouts?

Mr. Lanier: About the middle of the page. I can't tell you because these lines aren't numbered.

(Testimony of Dr. Harvey E. Starr.)

Q. Did you or not read the following question and answer:

"Question, by Mr. Packard's office:

"Now I will ask you to state, Doctor, following your examination what conclusion did you make with respect to this young girl?

"Answer: Dr. Mandel, my associate, and I both looked at the child. We examined her and then discussed the case and he and I in particular came to the conclusion that her loss of hair is what is known as alopecia areata."

Did you or not read that question and answer?

A. I did.

Q. Do you or not disagree with Dr. Michelson?

A. The whole deposition of Dr. Michelson has to be read, [312] because he also mentions fragilitis crinium.

Q. That's exactly what he does, doctor; he mentions it only. To say the least of it, doctor, you do not rule out alopecia areata?

A. No, that's one of the conditions that certainly has to be taken under strict consideration.

The Court: Perhaps the jury might withdraw for ten minutes. Court will stand in recess for ten minutes.

(Whereupon, a ten-minute recess was taken, and thereafter the following proceedings were had in open court:)

DR. HARVEY E. STARR

resumed the witness stand for further cross examination, as follows:

Cross Examination

Q. (By Mr. Bradish): Doctor, you indicated to Mr. Lanier, that, I think possibly three weeks to a month ago, you rendered a written report to Mr. Packard based upon your review of the depositions of Drs. Martin, Melton and Michelson, and the pictures that were furnished to you at that time. Is that right? A. That's right. [313]

Q. And in that report to Mr. Packard, doctor, did you give him at that time your opinion as to what condition you felt this girl had?

A. I stated that——

Mr. Lanier: One moment, if the Court please——

The Court: Answer that yes or no.

A. Yes.

Q. And at that time, based upon your review of the depositions, and the pictures that were made available to you, was your opinion based upon reasonable medical certainty? A. Yes, sir.

Q. And at that time, doctor, what was your opinion concerning this young lady's condition?

Mr. Lanier: Objected to, if the Court please, it's not the best evidence. The witness is here, he can testify.

The Court: I think that's a good objection. Something he may have said to Mra. Packard some weeks or months ago, I think would be——

Mr. Bradish: Well, all right; I'll rephrase the question. [314]

(Testimony of Dr. Harvey E. Starr.)

Q. (Mr. Bradish, continuing): Doctor, as of the time that you rendered the report, did you have an opinion based upon reasonable medical certainty as to what the girl's condition was?

A. Yes, sir.

Q. And what was your opinion concerning her condition at that time?

Mr. Lanier: Objected to, if the Court please. It's not the best evidence.

Mr. Bradish: What is the best evidence?

Mr. Packard: May I be heard?

The Court: Yes, you may.

Mr. Packard: He is asking this doctor for a medical opinion—he is a licensed M.D., a specialist in dermatology—as to what his opinion was based upon certain findings. He had pictures which he examined, and he certainly can give his opinion as to what condition, in his opinion, she was suffering from at that time.

The Court: I still sustain the objection on the theory that his [315] opinion now is what we are interested in, not what his opinion was, and what he may have indicated to Mr. Packard couldn't be of any help to this jury; what he testifies now what his opinion is.

Mr. Bradish: All right, your Honor, I think I can rephrase it.

Q. (Mr. Bradish, resuming): Doctor, you gave us an opinion here today based upon your reading of all of the depositions of the three doctors, Doctors Martin, Melton and Michelson, and the pictures that

(Testimony of Dr. Harvey E. Starr.)

you observed, and based also upon your physical examination of this young lady last Tuesday, and I believe you told us that based upon reasonable medical certainty you thought she had a condition known as fragilitis crinium?

A. Fragilitis crinium.

Q. Now, doctor, is that opinion that she has this fragilitis crinium based upon all of your examination, including her physical examination, the same opinion that you had concerning her condition prior to her actual physical examination by you?

Mr. Lanier: Objected to as immaterial, your Honor. Also it's repetition.

The Court: Sustained. [316]

Mr. Bradish: That's all I have.

Redirect Examination

Q. (By Mr. Packard): Dr. Starr, upon your physical examination of Sandra Tuesday, did you find anything from a clinical finding which you were not aware of at the time you read the depositions and examined the pictures which have been marked as Plaintiff's 32 and 33—now did you find anything at the time—do you understand that question—anything at the time of your physical examination that differed with the information you had through the history by reading the depositions and examination of the pictures? A. Yes, sir.

Q. What is that, doctor?

A. There were no smooth non-hairy areas along the ordinary hairy area of the scalp. There was hair growth all over, and——

(Testimony of Dr. Harvey E. Starr.)

The Court: You mean at the physical examination that you made?

The Witness: Yes, sir. [317]

The Court: Proceed.

A. (Continuing) The hair was lighter colored, more of a blonde however than the picture that I had see before. Finding no definitely bald spots, definitely circumscribed bald areas, I felt that my opinion should change from that which I had formed from reading the depositions, from that of an alopecia areata to that of a fragilitis crinium.

Q. And did you find any bald areas upon Sandra when you examined her on Tuesday?

A. No, sir, there was hair growth all over. The only difference is there's difference in the hair length. Some of it is just mere stubble, other hair is getting out there, like at the back of the neck here, a couple of inches long.

Q. And what is one of the findings that you expect—one of the usual, normal findings for alopecia areata, insofar as the condition of the hair upon the scalp?

A. Well, when the hair first comes out of course, in alopecia areata, it comes out as a rule in a definitely circumscribed area, say a coin-sized area in which all the hair in that area is lost. The area is non-inflammatory, it's definitely smooth. After a period of time, hair comes back in that area of alopecia-areata. [318] It may be changed in color for a period of time. In other words, in a case of alopecia areata where there has been a recent regen-

(Testimony of Dr. Harvey E. Starr.)

eration of hair, in the case of a person with dark hair you would expect to find white patches. Now that in time may correct itself. Normal pigmentation may come back too. So, when you are viewing these pictures and giving clinical impressions, they do vary from the time Dr. Martin saw the case to the time Dr. Melton saw the case to the time Dr. Michelson saw the case until Dr. Levitt and myself saw the case.

Mr. Packard: That's all, doctor.

Mr. Lanier: No further questions.

Mr. Packard: You may be excused, Dr. Starr.

(Witness is excused.)

Mr. Packard: Dr. Jeffreys, will you take the stand please. [319]

DR. C. E. P. JEFFREYS

called as a witness on behalf of the defendant, after being first duly sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

The Clerk: What is your name please?

The Witness: C. E. P. Jeffreys.

Direct Examination

Q. (By Mr. Packard): Dr. Jeffreys, will you please state your business, profession or occupation, sir?

A. I'm a consulting chemist for the Trusdale Laboratories in Los Angeles.

Q. Do you hold any position there?

A. I'm technical director of the Trusdale Laboratories.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Will you please state to us what business the Trusdale Laboratories is in?

A. Consulting chemists serving the public, and the problems of analyses, testing, research.

Q. And for what period of time have you been connected with the Trusdale Laboratories, doctor?

A. Twenty-two years.

Q. Will you please state to the jury your educational background and what degrees you hold, sir.

A. I hold a Bachelor's Degree and a Master's Degree in chemistry from the University of Texas, and a PhD degree in chemistry from the California Institute of Technology.

Q. PhD, that's a Doctor's degree from Cal. Tech. —is that correct? A. That's correct.

Q. And have you had any teaching experience, doctor?

A. Yes, I was teaching at the University of Texas and the California Institute.

Q. And what subject did you teach?

A. Chemistry.

Q. And do you belong to any scientific affiliations or societies, and please name them if you do?

A. Yes. I belong to the American Chemical Society; the American Society for Testing Materials; the American Association for the Advancement of Science; American Water Works Association; Paint & Varnish Production Club, and some honorary academic societies.

Q. And, doctor, have you had occasion to write any scientific publications? A. Yes, I have.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Will you please state what publications you have written or been the author of. [321]

A. I have written research papers and such journals as the Journal of the American Chemical Society; the Journal of Industrial Engineering Chemistry; Science, Food Industries.

Q. Now, could you state to us any commercial enterprises you have been connected with, or projects, or research for——

A. Well I have had four years post-doctor research project work at the California Institute. I formerly was an employee of the DuPont Company; Union Oil Company, and I worked for the City of Pasadena.

Q. Now, doctor, have you had any experience in running controls for the manufacture of cold wave solutions? A. I have.

Q. Will you please state what the ordinary composition—chemical composition—of cold wave solution contains?

A. Cold wave solutions commonly are a solution of a salt of thioglycolate acid, usually the ammonium salt.

Q. And is there any accepted range in connection with the manufacture of cold wave solutions, as to the percentage content of thioglycolate acid?

Mr. Lanier: I now object to this as going beyond the scope of this man's qualifications. He is a chemist, qualified I am sure, to break these down and state what it is. The accepted range of the industry, he is not qualified to do. [322]

(Testimony of Dr. C. E. P. Jeffreys.)

Mr. Packard: I think I qualified—the fact that he has run controls for manufacture of this.

Q. Have you familiarized yourself with the various cold wave solutions placed upon the market?

A. I have.

Q. And have you made analysis of various cold wave solutions that are presently upon the market?

A. Yes.

Q. And have you familiarized yourself by the reading of literature and journals relative to the production of cold wave solutions? A. Yes..

Q. And through your experience in running the controls, the journals you've read and analysis you've conducted, have you on opinion as to the accepted normal range of thioglycolate acid content of cold wave solutions? A. Yes.

Q. And what is it?

Mr. Lanier: Objected to, if the Court please upon the same grounds, for the same reasons as heretofore stated.

The Court: Overruled. He may answer. [323]

A. Cold wave solutions may contain as small an amount as three percent of calculated thioglycolate acid, and as high as ten percent.

Q. And is there any normal range of the common strength range used in the average cold wave solution?

Mr. Lanier: Same objection, your Honor.

The Court: He may answer.

A. Yes.

Q. And what is that, sir?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Of the order of seven percent.

Q. Now, at my request, did you examine and make analysis of a certain cold wave solution known as Cara Nome Pin Wave from a batch No. 181?

A. I did.

Q. What were your findings, insofar as thioglycolate content of the batch 181 of the specific——

A. 6.94 percent of thioglycolate acid.

Q. Now is that within the normal accepted range for the manufacture of cold wave solutions?

A. Yes.

Q. Now, did you further determine what is referred to as is it PH factor—— [324]

A. Yes.

Q. I think I used it as RH—it's the PH factor?

A. Yes, that's right.

Q. And will you please explain to the jury what is meant by the PH factor?

A. PH is a scale of measurement of alkalinity or acidity within numbers one, two, three, on up to seven PH, meaning different degrees of acidity —that is one is very strong acid, seven is neutrality, that's the same as pure distilled water, and from seven up to fourteen on the scale is the alkali scale—seven, eight, nine, on up to fourteen. It's simply a scale of measurement of the acidity or alkalinity of a water solution.

Q. Now did you determine the PH factor in this particular sample which you were provided with?

A. I did.

Q. Batch 181 of Cara Nome? A. Yes.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. And what was the PH factor?

A. Nine point two.

Q. Is that within accepted range for cold wave solution of nine point two? A. It is.

Q. Now, so that the jury understands—I know I have referred to the contents of thioglycolate acid, but is the solution itself an acid or an alkali? [325]

A. It's alkali.

Q. So we understand, when you pass beyond the seven PH factor, you get into an alkali rather than an acid? A. That's correct.

Q. So the actual cold wave solution, as it is placed upon the market, is an alkali rather than an acid?

A. Yes, it's an alkaline solution.

Q. And so really it's more or less a misnomer to refer to it as an acid, is that correct?

A. Well, the actual active ingredient is a salt of thioglycolate acid, it is an ammonium salt, and since thioglycolate acid is a weak acid and ammonia is a stronger base, that salt, in a water solution, will give an alkaline reaction.

Q. Well, are there other types of cosmetics upon the market which contain a larger or a stronger alkaline solution than a cold wave solution?

A. Yes.

Q. And what are those, doctor?

A. Soap will have a Ph of around ten.

Q. So some soaps have a higher or stronger alkaline content than the normal cold wave solution. Is that correct? A. That is correct.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Now is there such things as hair straighteners? [326] A. Oh, yes.

Q. And what do those contain?

A. Those contain normally caustic alkali, such as sodium or potassium hydroxide, and they are very strong. The Ph of those run up to twelve to fourteen.

The Court: Twelve to fourteen what?

The Witness: On the alkalinity scale, near the maximum.

Q. (Mr. Packard, resuming): Now, doctor, assume a cold wave solution containing approximately seven percent of thioglycolate acid, and a PH factor of nine point two, was applied in the giving of a home cold wave, and assume further that the person receiving the home cold wave did not make any complaint of any sensitivity insofar as the skin area of the scalp was concerned, or any burning sensation, would you have an opinion as to whether there would be any absorption of this chemical product into the system or the blood? A. Yes.

Q. And what is your opinion?

Mr. Lanier: If the Court please, it's objected to; there's obviously no foundation laid. This witness is not qualified, [327] he is getting into medical subjects. He is not a doctor. He can't tell what would absorb into the skin. He is not qualified to answer. He is not a toxicologist, he doesn't know what the absorption abilities of the chemicals are, he is only a chemist. The question is totally without foundation.

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: Well, I would suggest, if you wish to have that question answered, Mr. Packard, that you go further into his qualifications.

Q. Have you written any articles in bio-chemistry? A. Yes.

Q. And what articles have you written?

A. I've written research papers in the Journal of Biological Chemistry.

Q. And have you dealt in any experiments in connection with absorption of chemicals into the skin?

A. Yes. It's part of the chemist's business to know the dangerous properties of chemicals, and we certainly know the chemicals which are dangerous even when breathed, or taken by mouth, or exposed to the skin, that's the business of the chemist.

Q. Have you read papers and journals on that subject of absorption of chemicals through the skin?

A. Yes. [328]

Q. I believe that's sufficient qualification, your Honor.

Mr. Lanier: If the Court please, what can be absorbed through the skin and the scalp, and the results, is a medical opinion for expert testimony and that only, not a chemist. This man is not an M.D.

The Court: Oh, I don't know that the MDs have a corner on the knowledge in those matters. I'll let him answer it.

Q. What is your opinion, doctor?

A. My opinion is that there's very little absorp-

(Testimony of Dr. C. E. P. Jeffreys.)

tion through the skin of any material from an aquatic solution—water solution—there's very little absorption through the skin, of chemicals in general. The material most likely to be absorbed through the skin is oily materials or material contained in oil solutions rather than water solutions.

Q. Now, also, at my request, Dr. Jeffreys, did you have an occasion to make a chemical analysis of a Cara Nome natural curl pin curl permanent wave kit out of Lot No. 278? A. Yes, I did.

Q. Will you please state what your findings were in connection with Lot No. 278?

A. Well—— [329]

Mr. Lanier: May it please the Court——

Mr. Packard: All right, now, if you want to object, I think your grounds are well taken and I would like to withdraw Dr. Jeffreys from the stand for about two minutes to lay the foundation. May I do that, your Honor?

Mr. Lanier: If you will tell me what it is, I might not even object.

Mr. Packard: Well, I will put Mr. Lewis on the stand to testify as to the fact that they haven't changed.

Mr. Lanier: I think maybe you better, counsel, because I don't know what this is for.

Mr. Packard: All right, will you just step down, and Mr. Lewis will you please take the stand.

ARNOLD L. LEWIS

called as a witness on behalf of the defendant, Studio Cosmetics, having been previously sworn by the Clerk, in answer to questions propounded, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Packard): Mr. Lewis, do you know the approximate date on which [330] batch No. 181 was mixed, compounded or made, the approximate time?

A. Approximately October 22, 1954.

Q. And since that date to the present time, home——

The Court: Excuse me, Mr. Packard, I want to get the reporter to read that question for me again; I didn't follow it somehow.

(The reporter read the pending question.)

The Court: Very well. That was October, when?

The Witness: Approximately October 22nd, 1954.

Q. Since that date, to the present time, have you changed your procedure or your formula in any manner or any wise in the mixing, compounding or making of this particular Cara Nome Natural Curl Pin Curl permanent wave kit? A. No.

Q. It has been the same basic formula, and the same procedure followed? A. Correct.

The Court: I would like to ask a question Mr. Lewis. Do you mean by that that the same contents of all of the different elements in 181 are retained in your present [331] production, and ever since October 1954?

The Witness: In the pin curl permanent.

(Testimony of Arnold L. Lewis.)

The Court: That's what I mean.

The Witness: Each one of them are different.

The Court: I mean the pin curl.

Mr. Packard: The pin curl is the same now as it was at that time, is that correct?

The Witness: Correct.

(Witness is excused and left the witness stand.)

Whereupon,

DR. C. E. P. JEFFREYS

resumed the witness stand for further direct examination as follows:

Mr. Packard: Maybe I should ask one further question for the foundation I overlooked. Could I ask the witness at that position, your Honor? (Counsel was referring to witness Arnold L. Lewis who just left the stand.) [332]

The Court: You may.

Q. (Mr. Packard, addressing Mr. Lewis): Was C.N. 278 compounded, mixed or bottled after 181?

A. 278?

Q. Yes? A. I believe it was, yes.

Q. All right.

The Court: I don't get that question. Will you read that question?

Mr. Packard: I wanted to know whether lot No. 278 was bottled or mixed after 181?

The Court: 278 being what, I don't remember that?

Mr. Packard: The lot number.

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: What lot number?

Mr. Lanier: That's the very part, your Honor, I'm objecting to. I don't know where that came from——

Mr. Packard: This witness made an analysis of it, he testified.

The Court: He examined it? [333]

Mr. Packard: Yes.

The Court: Well, I can see what you're getting at.

Mr. Packard: Yes, he made an analysis of 278.

The Court: I get your point. Proceed.

(Witness Lewis is excused.)

Whereupon, further direct examination of Dr. Jeffreys proceeded as follows:

Q. (By Mr. Packard): Now will you please state what your findings were insofar as 278 was concerned?

Mr. Lanier: Now if the Court please, I object to that on the grounds of materiality. I don't know yet what Lot 278 has to do with this lawsuit.

Mr. Packard: Well there's some claim, your Honor realizes, as to the chemical content and so forth, that it has been changed; there's some inference——

The Court: I understood there would be some question raised here in [334] this case about the amount of this particular acid, whatever you call it —I can't pronounce the big name, but, it had been increased beyond the extent to which Mr. Lewis, or somebody, testified was the normal content of that

(Testimony of Dr. C. E. P. Jeffreys.)

particular solution, and I'm assuming now, that the purpose of this testimony is to show, first, that that particular content then, and still is, it hasn't been changed, and this man has examined one of the similar lots——

Q. Later—a later lot.

The Court: A later lot, but similar in all respects, according to Mr. Lewis' testimony.

Mr. Packard: That's right.

The Court: I'll permit it.

Q. (Mr. Packard, resuming): Will you please state what amount of thioglycolate was present in Lot 278?

A. Six point ninety percent of thioglycolate acid.

Q. And that differed then in four-hundredths of a percent, am I correct? A. That's correct.

Q. In other words that error could have—when I say "error," a difference of four-hundredths of one percent, could have been due to the amount [335] of time it set on the table between the tests. Is that correct? A. That's correct.

The Court: That would indicate a less strength of that particular——

The Witness: Practically identical.

The Court: All right.

Q. And did you determine the PH factor in Lot 278? A. Yes.

Q. And what was that?

A. Nine point O two. (9.02)

Q. And were those findings within the normal

(Testimony of Dr. C. E. P. Jeffreys.)

range of cold wave solutions upon the market at that time? A. Yes.

Q. And also the range of cold wave solutions that were upon the market in February 1955?

A. Yes.

Mr. Packard: You may cross examine.

Cross Examination

Q. (By Mr. Lanier): I just have one or two questions, doctor. I won't keep [336] you long. You have stated that the difference in the range of various home cold wave solutions that you have examined and checked—and I'm sure you have examined and broken down many—run from three percent to ten percent? A. That's correct.

Q. The variation, doctor, from three to ten itself, on the face of it, is some considerable variation, is it not?

A. It is a large variation.

Q. And of course, if we are just looking at it from the effectiveness of the cold wave itself, to do the purpose for which it is sold, that is also quite a spread, isn't it? A. It is.

Q. Now, how do you account for that spread?

A. Well, the cold wave solutions, of course, are intended for different purposes and different types of hair. The stronger solutions are—the very strong solutions are usually professional solutions. The medium range——

Q. Now, what do you mean by "professional solutions"?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Utilized and applied by professional operators.

Q. Beauty operators?

A. Yes. The medium range and low range are home permanent ranges. [337]

Q. So, whenever you speak of ten percent, you are actually speaking of the solution not that is sold in home waves; you are speaking of the solutions that are sold in beauty shops?

A. Most generally used by beauty shops.

Q. Yes. Now then, doctor, let's get back to home waves. What's the average norm in home waves?

A. Around seven percent.

Q. That's maximum?

A. Well that's the common range for the better grade, more effective, cold wave.

Q. Then it goes down to three percent?

A. Some of them for a special purpose use—well special purposes for hair that's been often waved, and hair that is sensitive, and the various factors that enable manufacturers to make a special purpose solution they can sell in those cases.

Q. Umhum. Now, at the time, Dr. Jeffreys, that you broke down batch 181 of Cara Nome Rexall permanent, how did you get it—did you get it in a package or just a bottle, or what?

A. No it came by mail from Mr. Packard's office.

Q. And it had the complete kit, is that it? [338]

A. No, just the bottle.

Q. All you got was the bottle?

(Testimony of Dr. C. E. P. Jeffreys.)

A. Cold wave portion.

Q. Nothing but the bottle?

A. That's correct.

Q. The cold wave portion?

A. Yes, the waving solution.

Q. That's the lotion that actually is the alkali—correct?

A. Yes, that's the waving solution.

Q. And with it, you didn't get the neutralizing compound? A. No.

Q. So you haven't examined the neutralizing compound that came with 181 and have no idea of what its contents are, chemically?

A. Yes, I have a pretty good idea, but I didn't examine it.

Q. You did not examine it? A. No.

Q. Now, is it not true, Dr. Jeffreys,—I've been calling it "thioglycolate" all the time, am I wrong in that?

A. "Thioglycolate"—it's a matter of preference.

Q. In other words, we're not too wrong——

A. That's right.

Q. Well, doctor, is it not—scratch that. I'd like to have you tell me what is keratolytic action? If you know, doctor. [339]

A. It's a medical term, but it means an action of acting upon the protanaceous material, keratin, having certain chemical action on keratin.

Q. In other words, that's a description of a kind of action, is it? A. Yes, chemical action.

The Court: What's keratin?

(Testimony of Dr. C. E. P. Jeffreys.)

The Witness: The tissue of the nails and hair containing protein—keratin.

Q. Then when we speak of the "keratolytic" action of alkaline salts of thioglycolate acid, we are speaking of the result on the hair, aren't we?

A. Yes.

Q. All right. Now, is it not a fact, within your experience, your research and writings, in this matter, Dr. Jeffreys, that thioglycolate is used in tanning processes for the purpose of removing hair from hide?

Mr. Packard: Well, I object, that's immaterial.

Mr. Lanier: It's very material, your Honor.

The Court: Overruled. He may answer. [340]

A. Yes. Certain thioglycolate salts are in certain strengths.

Q. That's correct. Now, then, if the strength, Dr. Jeffreys, becomes too strong, then it would result in the loss of hair, wouldn't it?

A. If it were strong enough and if it were of the proper content. Now ammonium thioglycolate is not used for removing hair from hide. It requires a stronger alkali and a stronger concentration.

Q. Well, doctor, would it be your statement that if it was a hundred percent solution, it would not remove hair from hide?

Mr. Packard: I object. This is immaterial, irrelevant and incompetent. The evidence only shows one strength is used. How can it have any bearing in this lawsuit that 100% was used to remove hair from hide?

(Testimony of Dr. C. E. P. Jeffreys.)

The Court: Oh, I expect he will get back to that pretty soon.

A. I don't think ammonium thioglycolate would be an effective dehairing agent for hide. I don't think it's alkaline enough.

Q. Which one do they use—which one of the thioglycolates?

A. A caustic alkali, salt or thioglycolate or one of the stronger bases. [341]

Q. It's still an alkaline substance?

A. Yes.

Q. It's still a thioglycolate?

A. It would be another salt of thioglycolate acid, but it would be a different chemical compound however.

Q. Now, doctor, one other thing, when you were speaking about the absorption of chemicals through the skin. You, of course, I am sure, don't claim to be a dermatologist, do you? A. No.

Q. Doctor, are you acquainted at all with the composition of hair—hair follicles?

A. No, I am not.

Q. Can you see this, doctor? This is a drawing, an exhibit that's been put up by the defendant. Can you see it? A. Yes.

Q. Theoretically, this is a hair. Now, are you aware of the fact that in order to kill that bulb, to kill individual hairs, that they place a needle right down alongside, running all the way down, without injuring the walls of the side of the hair? Are you aware of that? A. Yes, sir. [342]

(Testimony of Dr. C. E. P. Jeffreys.)

Q. All right. So, there's quite an opening there, isn't there, doctor?

A. It's a pretty fine opening.

Q. You can put a needle down?

A. Yes, you can put a needle down by stretching the hair follicle.

Q. And, therefore, of course, there is no question in your mind but what chemicals could also go down also the same—— A. Yes, indeed.

Q. You doubt that? A. Yes.

Q. If the doctors testify otherwise, you disagree with them?

A. I would. An oily material which is compatible with the oily and sebaceous materials found along hair, yes, to a slight extent, very slight extent.

Q. You disagree with the medical?

A. In that regard, I do.

Mr. Packard: There is no medical here that it can go down through there and that's assuming facts not in evidence.

Mr. Lanier: I am going by the testimony of two doctors who have testified, your Honor, and one in particular. [343]

The Court: That seems to be Mr. Lanier's idea of what it is. Perhaps the jury and you may have a different idea. Anyway, he has disagreed with it, whatever it is.

Mr. Lanier: That's correct, your Honor.

Q. (Mr. Lanier, resuming): Now, Dr. Jeffreys, one other thing. The hair itself—can hair itself absorb chemicals? A. Practically the same.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. Can chemicals run down the hair?

A. No. With a very fine opening of that sort—it's just like the fine capillary, if you put something in a very fine opening, surface tension will carry it, but this is an opening, a very fine opening, which is mostly fatty material which repels water—wouldn't allow the water solution to pass. Just like a drop of water put on a greasy plate won't spread out and run, it will stay in a drop—stay in a drop right at the top and it would be with great difficulty that you could force a water solution down such a very small fatty lying canal.

Q. And your feeling is the same with the hair itself—the hair shaft itself?

A. The hair shaft is a solid. [344]

Q. All right. There's no question, however, Dr. Jeffreys, that you do agree that the skin can absorb chemicals?

A. To a very, very small extent.

Q. To a small degree it can absorb?

A. Chemicals chiefly oily, of an oily nature. That is those compatible with the sebaceous material in the skin can absorb to a small extent. Things from water solution, practically none.

Q. Now what do you mean by "practically none," doctor?

A. Well an insignificant amount for any purposes of toxicities development.

Q. In other words, if ammonium thioglycolate could permeate the skin, it does have a toxic quality? A. I wouldn't say that.

(Testimony of Dr. C. E. P. Jeffreys.)

Q. You don't think it has a toxic quality?

A. Not very strong, no, and the amount that could permeate would be negligible.

Q. I don't mean very strong, doctor. I want to know if it's toxic in proper strength or not, in your opinion?

A. Toxicity—it depends on how it is given. If you drink a bottle of it, it wouldn't be very good for you, but putting it on your skin, no.

Q. And you don't think there is any question but what, [345] nevertheless, for instance, it would be listed with the toxic poisons if you drink it?

A. Not with a highly toxic poison.

Q. But toxic? A. It has some toxicity.

Q. Yes. Inherently dangerous?

Mr. Packard: Well, this calls for a conclusion. We're getting into legal terms now.

The Court: I think so.

Mr. Lanier: That's all I have, your Honor.

The Court: Any further questions?

Mr. Bradish: I have none.

The Court: Thank you very much.

(Witness excused.)

Mr. Packard: The next thing I want to read is this deposition. Maybe we could adjourn and start off with this Monday, your Honor. [346]

The Court: How many pages do you have in the deposition?

Mr. Packard: Well, there's 38 pages, and it will take probably 45 minutes.

The Court: Mr. Lanier, it's suggested here we

might, instead of undertaking to read 38 pages of deposition, we might wait until Monday morning.

Mr. Lanier: It's up to the Court, your Honor. I'm willing to stay until six o'clock or I'm willing to wait until Monday. I'm a long way from home.

The Court: Well, this is Friday afternoon. The jury has got to get home and get ready for the week-end and I suppose it might be an accommodation to the jury to get a little earlier start; I know it would to some of you. Now, be very careful over the week-end, ladies and gentlemen of the jury. The tendency of the juror, being very human, is to go out and tell your friends about the case you are sitting in and get their idea about how many different kinds of permanent wave lotions they have used, and what the effect was, and all that sort of thing. Well that isn't anything that you ought [347] to clutter your mind with at all. It might mislead you, and you've got to base your verdict in this case eventually on nothing else but the evidence in the case, and not what somebody else may have thought they had in the way of an experience, or their judgment on what might be the result of this, or that or the other. Just don't talk about this case to your husband and wife and the children and grandmother and aunts and all those people who might be around your home. Just say "that's behind me until Monday, I've got to wait until I get there Monday and hear this whole story before I can talk about it, then I'll tell you all about it later on." If you will do that please, you will be much better jurors. Now

you may withdraw and be back at ten o'clock Monday morning please.

(Whereupon, the hearing in the above entitled matter was adjourned until ten o'clock a.m., April 14, 1958.) [348]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 14, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open Court:

Mr. Packard: May I proceed, your Honor? [1]

The Court: You may proceed.

Mr. Packard: May I have the original deposition of Dr. Henry E. Michelson?

(The Clerk furnished counsel with said deposition.)

Mr. Packard: Your Honor, we don't have a sufficient number of copies of the deposition. Mr. Bradish will read from the original and I will take the stand and read the answers, but we don't have a copy for your Honor.

The Court: I'll listen, Mr. Packard.

Whereupon,

DEPOSITION OF DR. HENRY E. MICHELSON

witness for the defendants, was read in open court, Mr. Bradish reading the questions and Mr. Packard reading the answers, as follows:

Mr. Packard: This deposition is the deposition of Dr. Henry E. Michelson, which was taken on the tenth day of July, 1957, in his office in Minneapolis, Minnesota. Pursuant to stipulation, the deposition was taken on behalf of the defendants, Arnold L. Lewis and also Rexall Drug at that time. Is that sufficient, counsel? [2]

Mr. Lanier: That's sufficient.

Mr. Bradish: May the record show the appearances, Mr. Lanier, of Lanier, Lanier & Knox, Attorneys for the Plaintiff, and Mr. Backer of Reed, Callaway, Kirtland and Packard, Attorneys for the Defendants.

"Q. Will you state your full name, Doctor?

A. Henry E. Michelson.

Q. You are a medical doctor? A. Yes.

Q. Where did you take your training?

A. University of Minnesota.

Mr. Lanier: May the record show that we will admit the qualifications of the doctor, unless counsel wants them in the record for the deposition.

Mr. Backer: I would like them in the record.

Q. When did you graduate? A. 1912.

Q. Have you had any postgraduate work, Doctor, since receiving your degree?

A. Yes, in dermatology at the University of Minnesota and in Europe. [3]

(Deposition of Dr. Henry E. Michelson.)

Q. Where in Europe did you study?

A. Paris, London, Edinburgh, Vienna.

Q. Universities in each of those countries?

A. Yes.

Q. And you specialize in the field of dermatology, do you, Doctor? A. I do.

Q. How long have you specialized?

A. Since 1918.

Q. Since 1918. Where have you practiced this specialty?

A. Entirely in Minneapolis.

Q. Continually in Minneapolis? A. Yes.

Q. Have you ever written any articles in conjunction with your specialty, Doctor?

A. Yes, a great many, about two hundred.

Q. Have you received any honorary degrees in your profession?

A. Well, not degrees, but recognition.

Q. You have received recognition. Where have you received recognition?

A. Oh, I have been president of the American Dermatologists, president of the investigative society, chairman of the American Medical Association [4] Dermatological Department. I have been elected honorary member of a lot of European societies, British, German, Austrian, French, Italian, Swedish, Danish, Venezuelan. Quite a few.

Q. Now, Doctor, I believe you had occasion to examine Sandra Mae Nihill? A. Yes.

Q. When did you examine her?

A. On March 23, 1956.

(Deposition of Dr. Henry E. Michelson.)

Q. Where was the examination made?

A. At this office.

Q. And, for the record, where is your office located?

A. 715 Medical Arts Building, Minneapolis.

The Court: Pardon me. The date of that examination?

Mr. Packard: March 23, 1956.

Q. On the occasion of that examination did you take a history from the young lady? A. I did.

Q. Did anyone accompany her at the time of examination?

A. Yes. Her mother, I believe. Yes, I am sure.

Q. What did that history divulge?

A. May I read it? [5]

Q. Yes. You have the records there that were made at the time?

A. Yes. The history as we noted it was as follows: She was fourteen years of age. She was the fifth of six children. The family were farmers and lived in Kensal, North Dakota. The trouble for which she came had been present thirteen months. The disease, or whatever you want to call it, was confined to the scalp. She had previously been seen by a Dr. Clarence Martin and Dr. Frank Melton of Fargo. Dr. Melton was a skin specialist, so I paid more attention to his information. That was the history. She used a wave solution. She had used wave solutions before. Not the wave solution, but a wave solution. On February 5, 1955, had used Cara Nome home wave kit. They thought the solu-

(Deposition of Dr. Henry E. Michelson.)

tion smelled strong. When applied caused a burning sensation. Two weeks later she noted hair loss in the front area. Then a substantial loss throughout the scalp resulting in complete loss by June of 1955. On examination there were no hair stubs, that is little roots, left. No inflammation. This is what she told me. This isn't what I saw. No hair stubs, no inflammation. Since then slow [6] regrowth of hair reaching about half-inch in length. Her past health was good. Had the usual childhood diseases. Diet was good. She was a large child, weighed about 150 pounds. Menstruation was regular, even at the age of twelve. She had no childhood eczema. The family history: There was no history of anything similar. They did state, though, that she was sensitive to sunlight and she excoriated her skin frequently. That is, scratched often. That's all the history.

Q. Well, now, Doctor, at the time of your examining the child, her hair was growing to some extent, was it?

A. Yes. Here again are the notes. There was short stubble, dark and light color, normal tensile strength. That is, we took out a hair and pulled on it and it didn't break. The entire scalp mildly reddened and had a few scales, like dandruff.

Q. That would be similar to dandruff of the scalp, the redness that you refer to?

A. That's right. And there was loss of eyebrows and eyelashes. That was the extent of that.

Q. You indicated that there was a difference in

(Deposition of Dr. Henry E. Michelson.)

color in the hair that you observed? A. Yes.

Q. Have you any explanation for that? [7]

A. That is a frequent occurrence when hair regrows after loss not to have uniform pigmentation.

Q. Have you ever come in contact with a patient who, as this girl, claims to have lost her hair following use of a permanent wave solution?

A. You mean complete loss?

Q. Yes. A. No, I have not.

Q. You know the ingredients of cold wave solution, do you, Doctor?

A. Well, in a broad way, yes. I had it written down in here. Ammonium thioglycolate.

Q. That is present in all cold wave solutions?

A. I think in most.

Q. Now, from your observation of the history that you received from this girl and her mother, were you able to form any conclusion as to the cause of her loss of hair? A. No, I was not.

Q. Now, without any damaging of the scalp itself, Doctor, following the use of any application on the hair, such as scarring or inflammation of the scalp, are you in a position to express an opinion as to whether or not the solution used would be the cause of the loss of hair? [8]

Mr. Lanier: That's objected to, your Honor, on the ground it is an improper hypothetical question. There is no proper foundation laid.

Mr. Packard: Maybe your Honor would like to read the question?

The Court: No, I think he may answer it.

(Deposition of Dr. Henry E. Michelson.)

A. I will have to qualify the answer. I saw her thirteen months after it happened, so I couldn't.

Q. Well, based on the history that you received from her that there was no scarring or inflammation of the scalp following application of this cold wave solution that she states she used, are you in a position to say whether or not the ingredients of that cold wave solution could have caused the loss of hair.

Mr. Lanier: Same objection, your Honor.

The Court: He may answer.

A. I would have to answer it in this way: That if hair were to be lost from an application or the reaction to an application there would have to be [9] inflammation preceding the loss of hair.

Mr. Lanier: I'll withdraw that objection.

Q. Doctor, in your experience in the field of dermatology, have you come in contact with people who have lost their hair? A. Yes.

Q. What, in your opinion, is the cause of the loss of hair?

Mr. Lanier: If the Court please. That is objected to upon the ground that it is an improper hypothetical question, asked in general of all people, not the application to the particular set of facts in this case.

The Court: He may answer.

A. I would have to answer there are many causes.

Q. Will you relate the causes known to you for the loss of hair?

(Deposition of Dr. Henry E. Michelson.)

A. Well, hair may be lost from an acute disease like influenza. It may be lost from use of an anesthetic. It may be lost due to some toxic drug like thallium. It may be lost by unknown causes known as alopecia areata.

Q. Is that last cause unusual, Doctor? [10]

A. That is the most usual of all those I mentioned, alopecia.

Q. No apparent reason for the loss of hair?

A. That is unknown.

Q. Do persons suffering from allergies lose their hair on occasion, Doctor?

A. No. I would say no. I have seen no loss of hair definitely due to allergy.

Q. Now, you indicated that this girl's eyebrows and eyelashes, she gave a history of them having fallen out? A. That's right.

Q. Had they grown back in when you saw her, Doctor? A. No, they had not.

Q. Now, from your experience, Doctor, are you in a position to say whether or not an application of the ingredients of a cold wave lotion, the ingredient you mentioned a short time ago, I have forgotten the word now——

A. Ammonium thioglycolate.

Q. If that solution were put on the hair would it immediately cause the hair to break or fall out?

Mr. Lanier: Withdraw the objection. [11]

Mr. Packard: Well, there's no answer.

Q. You are familiar with that drug, are you, Doctor? A. The solution, yes.

(Deposition of Dr. Henry E. Michelson.)

Q. The solution? A. In a general way.

Q. What is its reaction to hair and on hair?

A. It softens the hair so that when it is bent it will stay bent. That is about the easiest explanation.

Q. Does the length of time it is left on the hair have a different effect on the hair?

A. Yes. There is a prescribed time for its use.

Q. If it is left beyond that time, what effect does it have on hair, Doctor?

A. Well, just short action, more angling than you want.

Q. Would it cause the hair to break off or fall out?

A. I think it could if left long enough.

Q. Well, now, should it have that effect on hair and cause it to break off or fall out, would the effect be immediate or would it be delayed?

A. Delayed.

Q. For what period of time?

A. Oh, probably quite a long while, at least [12] several days if not longer.

Q. After the application, if it were in such intensity or left on to such an extent as to cause the hair to fall out or break, would it leave any evidence of irritation in the scalp in your opinion?

A. It should, yes.

Q. Following your examination of Miss Nihill and after hearing all the history of her case, did you form any conclusion as to the cause of her losing her hair, Doctor?

(Deposition of Dr. Henry E. Michelson.)

A. Well, after examining her and after reading the reports from Dr. Melton I did.

Q. Did you have a report from her attending physician, Doctor Melton?

A. I have a report from the file.

Q. Do you have that report there?

A. No, I haven't it here. You took it. I think we were asked to read that report.

Q. Doctor, I will show you here a report. Is that the one to which you refer?

A. Yes. I say this is the same.

Q. Now, in that report this is—can you describe this report, Doctor, what's the nature of it?

A. Well, a medical report. Report of an examination of the child. [13]

Q. Now, under present illness this report reads: "In February of 1955 patient had a home permanent. This was made by Cara Nome. It was for pin curls. Following the permanent there was no erythema——

A. That is redness.

Q. "No vesiculas——

A. That is blisters.

Q. "No signs of irritation. But within a week she began to lose hair. There has been no illness in the past year. The hair has always been abundant in their family and there has been no change in her pubic or axillary hair. Patient has been very active all year. There has been no history of being away from home during this past year." Now, with that finding, Doctor, that there was no erythema or no

(Deposition of Dr. Henry E. Michelson.)

vesicula and no signs of irritation, in your opinion would the loss of hair have been caused by the application of any substance that would cause hair to break off or fall out without leaving some trace of erythema or vesicula or signs of irritation?

Mr. Lanier: Withdraw the objection.

Q. Now will you answer the question, Doctor?

A. Well, I have to answer it in this way: That loss of hair from a local application couldn't be brought [14] about without external manifestations and in this instance I would think that would be very unlikely.

Q. Now, if hair on the scalp would fall out due to the application of some substance, would the eyebrows and eyelashes likewise fall out if the same substance were not applied to the eyebrows or eyelashes? A. Positively no.

Q. Did you have any discussion with Miss Nihill with regard to the manner in which the cold wave was applied? A. No, we didn't.

Q. Now, I will ask you to state, Doctor, following your examination what conclusion did you make with respect to this young girl?

Mr. Lanier: Withdraw the objection.

A. Dr. Mandel, my associate, and I both looked at the child. We examined her and then discussed the case and he and I in particular came to the conclusion that her loss of hair is what is known as alopecia areata.

Q. In layman's language that is what, Doctor?

A. That is loss of hair of unknown cause.

(Deposition of Dr. Henry E. Michelson.)

Mr. Bradish: Do you want me to read the cross?

Mr. Lanier: May it please the Court, we would prefer to read our own cross.

The Court: Very well.

(Whereupon, the cross examination of the witness was read, Mr. Lanier reading the questions and Mr. Rourke reading the answers, as follows:)

"By Mr. Lanier:

Q. Doctor, you did not examine Miss Nihill as a patient, did you?

A. Well, no. You mean in the sense that I was going to prescribe for her?

Q. Correct. A. No.

Q. Then following that, as a matter of fact, of course you prescribed no treatment or made no medical services to her or her mother at all?

A. None.

Q. She was not examined by you at her request?

A. No.

Q. Now, you have spoken, Doctor, of ammonium thioglycolate? A. Yes. [16]

Q. As being a component part of most hair waves, which within your own field of knowledge you know that to be the fact?

A. Well, in a limited way, yes.

Q. Not as a chemist, I don't mean that, but because of coming in contact with various skin irritants and what causes them and so forth. Then, also I presume, Doctor, that you also know that in addition to ammonium thioglycolate, that also most

(Deposition of Dr. Henry E. Michelson.)

all these hair wave cold lotions for home use contain potassium bromide?

A. Potassium bromide? I didn't know that.

Q. Well, of course, Doctor, you do know what potassium bromide is? A. Yes.

Q. Well, now, Doctor, you have also testified that ammonium thioglycolate in its effect upon hair makes it softer, more pliable, is that correct?

A. That is my general understanding of it.

Q. And I believe, also, Doctor, that it swells the hair, does it not?

A. I believe so. I am not positive.

Q. Wouldn't that be normally what you would expect was to be one of the results of its application? A. I frankly don't know. [17]

Q. That in itself and standing alone, of course, would not make hair friable so that it would break off, would it? A. I would think not.

Q. In fact, it would do the opposite, wouldn't it?

A. Make it tougher?

Q. Make it softer and more pliable rather than softer and brittle?

A. I have no information on that score. I don't know.

Q. Well, Doctor, do you or not know that when the second solution containing potassium bromide is applied to the cold wave, that it hardens the hair? Would that be a natural result?

A. Well, as I say, I don't know much about the process. I have heard of neutralizer.

Q. Well, that is the neutralizer, Doctor. Then

(Deposition of Dr. Henry E. Michelson.)

you don't know of your own knowledge whether the application of that second chemical would tend to make the hair friable so that it remained hard and in place? A. I do not.

Q. But at least you do know that probably that is the neutralizer? A. Yes. [18]

Q. Doctor, I want to ask you a little bit more about ammonium thioglycolate. As a matter of fact, let's start on its best help effect, if any. Taken internally I believe you as a medical man would state that it was very definitely dangerous and deadly, would it not be?

A. I don't know. I really have no knowledge of it as a chemist.

Q. Then as a matter of fact, Doctor, you don't have any knowledge upon the internal workings of the particular chemical of ammonium thioglycolate?

A. No.

Q. Do you know as to whether or not its seepage through the skin into the pores could cause, for instance, disease of the liver? A. I do not.

Q. Now, Doctor, in the directions, and supposing that the directions point out the care in the event that the original solution should get onto your scalp or your skin, either under the hair or on the forehead or on the side, the directions include the fact that it should be immediately wiped clean with absorbent cotton. [19] Medically, from a dermatologist's standpoint, do you know the reason for that?

A. Your question isn't clear. It can't be kept off the scalp and put on the hair, can it?

(Deposition of Dr. Henry E. Michelson.)

Q. Correct, but nevertheless the directions say careful when reaching the scalp, pad it off with cotton, or on the skin. What is the danger of ammonium thioglycolate being on the skin?

A. Just an irritant, I would think.

Q. Can that go through the pores of the skin?

A. I doubt it.

Q. In other words, it is your feeling that you doubt that it can? A. Yes.

Q. Supposing that in the application of this particular Cara Nome cold wave solution, and presuming that testimony will show that it does contain a certain percentage of ammonium thioglycolate, you have no opinion as to its effect should it seep down through the pores of the scalp?

A. Well, I have an opinion that nothing can seep down through the pores of the scalp. The scalp is impervious to solution.

Q. Then, Doctor, right there may I ask you first of all would you, for the benefit of the jury, would [20] you give us the composition of a hair, its subscalp growth as it comes to the scalp and enters, then comes out as the hair we see. Would you just briefly tell us that, please?

A. Mean the chemical composition?

Q. No, the physical makeup of the cells and hair itself?

A. Well, the hair is a cylindrical shaft which is attached to the scalp itself by way of an anatomical papilla. That is what the layman calls a root. The

(Deposition of Dr. Henry E. Michelson.)

hair comes up through that opening and emerges out of the opening.

Q. It comes through the opening of what?

A. Of the skin of the scalp.

Q. Now, when you are referring to scalp in the question I previously asked you, Doctor, what is your definition of the scalp?

A. Definition of the scalp? The scalp is an anatomical portion of the integument of the body, hairy portion on the head. The scalp is definitely referred to as an integument of the head and bears hair.

Q. In the layman's language, is that the skin of the head or not?

A. It is the entire skin. [21]

Q. The entire skin? A. Yes.

Q. Now, is it that skin, Doctor, you are stating that you doubt a chemical could seep into that skin?

A. You mean seep in in the sense of being absorbed systemically?

Q. Yes? A. I doubt it very much.

Q. Could it seep into the skin of the scalp sufficiently so as to damage the hair underneath the skin?

A. You mean the portion of hair under the skin?

Q. Correct.

A. It is possible, but very unlikely.

Q. Could it not soak into the hair and go down below the scalp line, skin line?

A. I don't think so.

Q. By following the course of the hair itself?

(Deposition of Dr. Henry E. Michelson.)

A. Well, the entire thickness is less than a sheet of paper, almost.

Q. Well, if that were true, Doctor, it would be very impossible for you to have a medical history of liver trouble caused by external application of solutions bearing ammonium [22] thioglycolate?

A. I am not a taxicologist. I don't know.

Q. Now, Doctor, of course you are not testifying from either your knowledge from examination or from any case history given you that there was no skin irritation, no inflammation, no scalp erosion, or anything of that kind for a matter of several weeks after the application, are you?

A. Your question isn't very clear.

Q. Maybe I had better reframe it. Your examination was made thirteen months after the application? A. That's right.

Q. According to your history. So you, of course, would not know from your personal knowledge whether or not there was any scalp irritation, whether or not any inflammation, if there was a pus condition or this scratching or whatever there was?

A. That's right.

Q. Now, Dr. Melton reported his examination was also made many weeks after the application so any information you have gotten from him [23] you would not expect to learn that, would you?

A. No.

Q. Do you at present have any information at all from her local doctor prior going to the specialist, Dr. Melton at Fargo?

(Deposition of Dr. Henry E. Michelson.)

A. No, I have none.

Q. Doctor, you know Dr. Melton, do you not?

A. Yes.

Q. Who is now practicing as a skin specialist in Fargo, North Dakota, with the Dakota Clinic?

A. Yes.

Q. Do you know him by reputation?

A. Yes.

Q. Do you know him to be a fine skin specialist?

A. Yes.

Q. And you have confidence in his ability and his opinions? A. I have.

Q. Doctor, is there not at each shaft of hair a depression, from which it grows that you doctors call a follicle?

A. Follicle. Follicle is the hair follicle consisting of hair, shaft of hair, root of hair, and gland that is attached to it, that is to the sebaceous gland. [24]

Q. Now, is it also your opinion that no solution of ammonium thioglycolate could get into the gland of hair through the shaft of hair and follicle itself?

A. A little might get around the shaft, but that's all.

Q. Then if that were true, the degree of harm of permanent nature that it might do would be based, I suppose, upon something which you don't now know, the strength of the solution?

A. I can't answer that.

Q. In other words, Doctor, you wouldn't answer it without knowing the strength of the solution and possible damage?

(Deposition of Dr. Henry E. Michelson.)

A. I don't know anything about the strength of the solution used in hair waves.

Q. In other words, you would have to have a more chemical knowledge of the possible damage that ammonium thioglycolate itself could cause?

A. Yes.

Q. Now, Doctor, in your experience you have seen cases before, have you not, where there has been a temporary loss of hair by the application of cold wave solution? [25]

A. You mean temporary total loss or temporary spot loss?

Q. Well, temporary spot loss?

A. Well, I personally have not seen loss. I have seen hairs damaged, but no complete loss.

Q. In other words, you have seen hair damage caused by the application of home permanent wave solution? A. Yes.

Q. In your own personal experience, you have not run into any permanent loss?

A. Or any loss. Just the hair itself would be in the cases I see and not the scalp.

Q. Where the hair itself due to friability broke off?

A. Not brittle. Broke off at the scalp line, but not in the scalp itself.

Q. You have not personally experienced in any patients a scalp damage from such application?

A. No, I have not.

Q. Have you, Doctor, in your own experience ever had occasion to treat any type of hair or scalp

(Deposition of Dr. Henry E. Michelson.)

injury caused by home cold wave, permanent wave application, by either under violet cold [26] quartz or superficial x-ray therapy?

A. No, I have not.

Q. Have you had any occasion, Doctor, to treat hands and other skin parts of persons who have developed a dermatitis due to the handling of home permanent waves? A. Yes, I have.

Q. Now, would you tell me how that damage and dermatitis is caused?

A. How that damage and dermatitis is caused?

Q. Yes?

A. Well, in your question you state that they had dermatitis due to that permanent solution.

Q. But I mean medically, Doctor, what is the cause in that solution or has caused the dermatitis?

A. I don't know.

Q. But you do know that the skin has been diseased due to the contact with some solution in the home wave?

A. No, we have to put it another way than that. I have seen dermatitis of the hands in hairdressers who use permanent waves but other things, too.

Q. So we do know that it can damage the skin?

A. No. We do know that hairdressers have their skins damaged. I would have to put it that way. [27]

Q. Now, Doctor, from either your examination of the plaintiff child in this case or from any case history which has been submitted to you, subjectively, either by her or by Doctor Melton, have you found any subjective findings to indicate loss of

(Deposition of Dr. Henry E. Michelson.)

hair, which you have described as alopecia areata, in her history or background?

A. Do you mean how would I substantiate that diagnosis?

Q. No. I presume that was visibly. But in her case history anything about family history or background to indicate the susceptibility or likelihood of her having the condition which you have described as alopecia areata?

A. It is hard to answer the way you put it. There is nothing in family history that predisposes one to alopecia areata. Do you mean is there anything in her history that leads me to believe she had it?

Q. That she would anticipate she might?

A. There is no way of anticipating alopecia areata.

Q. You don't feel, Doctor, that has a tendency in families? A. No. [28]

Q. And you don't so find it?

A. It has occasionally been found, but extremely rare, extremely rare.

Q. Was there anything at all, Doctor, about your examination objectively of her skin which would indicate any allergy of any kind or anything unusual in her skin?

A. Yes. In that she had many scratch marks on her arms and on her back and that her mother said she scratches continually and often.

Q. Did you take any skin patch, Doctor?

A. No.

(Deposition of Dr. Henry E. Michelson.)

Q. So from a skin patch you yourself have no opinion to give as to the normality or abnormality of the skin?

A. No. Patch tests don't prove that. I don't know what you mean exactly.

Q. If any patch tests were taken by Dr. Melton, would you be inclined to have confidence in the conclusion he drew from the patch tests?

A. You mean to prove that some substance was causing it?

Q. No.

A. That is what patch tests are used for. [29]

Q. Would you have confidence in the result of his patch tests? A. If he made any.

Q. And his conclusion. Outside of what you call a scratching and the apparent scratching, either by the child herself or someone else, did you note anything else physically and objectively abnormal about her skin? A. No.

Q. Do you have an opinion, Doctor, based upon your examination as to whether or not this condition with her hair and scalp is permanent?

A. Well, yes. It is not permanent because hair had already grown back in when we saw her.

Q. Then it is your opinion that it is not permanent? A. Well, yes, it is my opinion.

Mr. Lanier: Plaintiff's Exhibits A and B are marked for identification. For the record, your Honor, that is Exhibits of the girl without hair. Now, I don't recall right now what numbers they are now. What are those numbers Mr. Clerk please.

(Deposition of Dr. Henry E. Michelson.)

The Clerk: 32 and 33. [30]

Mr. Lanier: A and B when we refer to them are 32 and 33, in this record, your Honor.

Q. Doctor, I show you two photographs which have been marked Plaintiff's Exhibit A, or 32, and Plaintiff's Exhibit B, or 33, which purport to have been taken both on May 26, 1956, that being, I believe, a year and three months after your examination of this girl?

A. I saw her March 23, 1956.

Q. You saw her what date?

A. March 23, 1956.

Q. That was thirteen months after injury?

A. Yes.

Q. Taken two months after you saw her. Would you tell me by looking at Exhibits A and B whether or not that hair and scalp appear to you to the best of your recollection approximately as it was at the time you examined her?

A. Well, I frankly can't make the comparison.

Q. You don't remember, is that it?

A. Yes, I couldn't possibly.

Q. Do you recall, Doctor, whether or not the hair you refer to as having found on her head was full growth?

A. We call it stubble growth. [31]

Q. Now, then, Doctor, if testimony should disclose and the witness herself visually should demonstrate by her appearance in Court at this date, or at the date that it comes to trial in Los Angeles later,

(Deposition of Dr. Henry E. Michelson.)

that she still is essentially or approximately in that condition, would your opinion change?

A. About what?

Q. As to its permanence?

A. No, it wouldn't change.

Q. Even though that condition remains as you see it in Exhibits A and B two years after the application and falling out of hair?

A. I have seen hair return in five or six years later, so we never make a statement it is permanent.

Q. Now, Doctor, in your experience how often have you seen hair return five years later?

A. Well, it is an impossible percentage to quote. I don't know.

Q. If it has not returned for two years, basing your opinion upon reasonable medical certainty, isn't the percentage much, much greater that it will will not return than that it will? [32]

A. I can't state that.

Q. Well, normally, doctor, from your experience?

A. There is no normal to such cases. It is not the best line to go from.

Q. When hair has not regrown for a period of two years in a situation such as you see in Exhibits A and B, and such as now exists in the plaintiff herself, you feel that within reasonable medical certainty you can't even tell me what the percentage chance is? A. I can't.

Q. Doctor, answer this. After two years without

(Deposition of Dr. Henry E. Michelson.)

any regrowth, has it not been your experience that it is more apt not to regrow than it is?

A. I said I just can't make a statement. That may or may not come back. No one knows.

Q. Then you definitely wouldn't say that it is not permanent?

A. I wouldn't say at all. I just refuse to say.

Q. Now, Doctor, you also were asked whether or not normally, when you found this loss of hair, which, as counsel asked you, it were caused by a solution, would you normally expect also the eyebrows and eyelashes to also have disappeared, [33] to which you answered no. But now, Doctor, if again I told you that the directions stated that in the first instance in dampening the curl they use one-half of the solution and after the curl had set for the prescribed time they took the other half of the bottle and poured it on your head, catching the residue in a bowl, we know of course it is going to drip over the lashes and eyebrows, would your opinion be the same if that is true?

Mr. Packard: There is an objection there that there is nothing conclusively proved that it would necessarily drip over the eyebrows or eyelashes.

The Court: Do you want a ruling on that Mr. Packard?

Mr. Packard: Yes.

The Court: Objection is overruled.

A. That is a hard question to answer.

Q. Well, Doctor, at least if the same solution had caused damage to the hair and the same solution at

(Deposition of Dr. Henry E. Michelson.)

the same time did get on the eyebrows and eyelashes, [34] it could cause the same damage to them that it did to the hair, could it not?

A. We will put it this way: When you have total loss of eyebrows and total loss of eyelashes, I can't conceive of the solution hitting each and every one of the eyebrows and each and every one of the eyelashes; whereas you rub it into the scalp, you could picture it getting to each hair, but I can't understand how each and every eyelash would be affected.

Q. But at least would change your opinion if it poured down the forehead and over the lashes and brows?

A. No, it wouldn't change mine.

Q. In other words, you don't think that would happen, Doctor?

A. I don't think so. It would burn the eye itself then and be much trouble.

Q. Doctor, in the layman's language just what is alopecia? Isn't that baldness?

A. No. It is sudden loss of hair with complete loss in several areas or complete.

Q. What do you call a young man twenty-four or five who in a comparatively short time loses his hair and becomes bald? [35]

A. Call that praesenilis alopecia.

Q. What do you call it normally in one of us who has reached age forty or forty-five and starts going bald and does go completely bald?

A. You mean completely?

Q. Even partially like myself.

(Deposition of Dr. Henry E. Michelson.)

A. You would call it the normal course of events.

Q. Would you define exactly for us, Doctor, alopecia areata?

A. As I just defined it, it is a sudden loss of hair leaving areas completely devoid of hair and no damage visible to the external scalp and most always the hair returns.

Q. Do we normally find alopecia in a child of twelve, thirteen, or fourteen years of age?

A. Well, no disease is normal. No, don't normally find it, but it is common in children.

Q. It is common in children of that age?

A. Yes.

Q. In what age is it most common?

A. Well, it is a disease that goes from early, even from birth, up to death. I don't know. I mean the entire gamut of age.

Q. Doctor, I am now referring to a letter written [36] by you April 14 to James, Jungroth, Mackenzie and Jungroth, attorneys at law of Jamestown, North Dakota. Referring to paragraph four of that letter at the bottom of the first page you state: "The entire scalp was mildly reddened with granular scales." Would you explain that for us, please?

A. Well, you might for a layman's point of view, like dandruff.

Q. Well, how about the scalp being reddened?

A. Irritated looking, yes.

Q. In other words, you did find the scalp reddened, irritating looking, and granular?

A. But you notice we said mildly.

(Deposition of Dr. Henry E. Michelson.)

Q. Now, when you state also in that letter there was evidence on the upper back and shoulder of previous excoriation, you mean previous scratchings, that is what that is, isn't it?

A. That's right.

Q. Doctor, would you define for me seborrheic dermatitis?

A. It is a very broad term used to indicate any permanent inflammation on those areas that have sebaceous glands. [37]

Q. Then you do find inflammation of sebaceous glands in that type of seborrheic dermatitis?

A. It is presumed, yes.

Q. In the examination of this girl?

A. It is a very broad term. Yes, we found some mild. I might add it is a very common condition that people aren't even aware of.

Q. Now, you also stated in that letter, Doctor, that the first condition, that is "fragilitis crinium" describes friable hairs resulting from some chemical interference with the normal physical structure of the hair. A. Yes.

Q. Then it was your opinion and must be now that there was chemical interference with the normal physical structure of the hair?

A. At the time we saw her, her hair wasn't normal in appearance. That is what that means.

Q. And you did state then that it resulted from chemical interference with the normal structure?

A. No, I didn't say it resulted from it. The chem-

(Deposition of Dr. Henry E. Michelson.)

ical may be a physiological chemical, her own oil may be causing it.

Q. Correct, Doctor, but you did not ascertain for [38] sure one way or the other whether it was her oil? A. No.

Q. All you knew was it was chemical interference, whether or not from her body or from some outside source? A. We infer that, yes.

Q. Did you find at all, Doctor, any fungi growth at all that could have caused this loss of hair?

A. We didn't make any cultures. Dr. Melton had.

Q. Did you find any thyroid condition at all that could have caused this loss of hair?

A. We didn't examine her for thyroid.

Q. And you found no burns, abrasions, or anything of that type? A. No.

Mr. Lanier: That's all, Doctor.

Mr. Lanier:

Redirect Examination

Q. (By Mr. Backer): You stated that you have treated beauty parlor operators who have been suffering from conditions on their hands due to the use of hair wave lotions or other ingredients? [39]

A. I have, yes.

Q. How would you describe that condition?

A. Well, we call it an occupational dermatitis, something we see in barbers and hairdressers.

Q. Have you ever found one suffering from that condition received it solely from the use of cold wave solution?

(Deposition of Dr. Henry E. Michelson.)

A. Well, no. I couldn't put it that way, because they do so many things.

Q. They handle many solutions?

A. That's right.

Q. Many of which have chemical contents in them? A. That's right.

Q. Now, with regard to this Sandra Nihill and your findings, your diagnosis was that she was suffering from fragilitis? A. Friable hair.

Q. And mild?

A. Seborrheic dermatitis.

Q. Does that condition ever exist in people who suffer from an allergy?

A. Well, we don't call it an allergic disease, no.

Q. But do people who have suffered from allergies have that condition? [40]

A. Well, it is so far apart I can't state.

Q. Well, isn't it true, Doctor, that frequently you will have a patient who uses a product in common usage who gets some abnormal reaction?

A. Oh, yes, indeed.

Q. Is that an uncommon situation?

A. It is very common.

Q. Some people develop irritation to their skin caused by sun, do they not, Doctor?

A. They do.

Q. And some from eating eggs or drinking milk?

A. That's right.

Q. And different foods cause different irritations of the skin? A. Yes.

Q. As a matter of fact, most every substance in

(Deposition of Dr. Henry E. Michelson.)

use you will find certain people who are allergic to that condition, do you not, Doctor?

A. Or sensitive, yes.

Mr. Backer: That's all.

Recross Examination

Q. (By Mr. Lanier): Just one thing, Doctor. In your experience have [41] you had housewives or individuals other than beauticians whom you have treated, whose case history has indicated cold wave solution has caused dermatitis on their hands or skin?

A. I think I probably have. It is very rare.

Mr. Lanier: That's all."

Mr. Bradish: May we approach the bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench, and the following proceedings were had, out of the hearing of the Jury:)

Mr. Bradish: Friday, I gave your Honor a photostatic copy of the agreement——

The Court: It's laying on the desk in the other room. I'll get it for you. The jury may withdraw and be absent from the room a little while anyway. [42]

(Whereupon, a short recess was taken, after which the following proceedings were had in open court:)

Mr. Bradish: May I proceed, your Honor?

The Court: You may proceed.

Mr. Bradish: Mr. Stark will you step forward.

THOMAS HENRY STARK

having been previously sworn, testified as follows, on behalf of defendant Rexall Drug Company:

Direct Examination

Q. (By Mr. Bradish): Mr. Stark — May I approach the witness, your Honor?

The Court: You may.

Q. (By Mr. Bradish, resuming): I show you a photostatic copy here of an agreement, counsel has stipulated he has seen the original, and that the photostatic copy is an exact copy of the original, and for foundation purposes [43] may be used with the same force and effect as if the original were put in evidence.

Mr. Lanier: It is so agreed.

The Court: Very well.

The Clerk: Do you want this marked, counsel?

Mr. Bradish: Yes. I think I better.

The Clerk: Defendant's Exhibit B marked for identification.

(Thereupon, the document referred to was marked for identification, Defendant's Exhibit B.)

Q. (By Mr. Bradish, resuming): Now, Mr. Stark, I show you defendant's Exhibit B, and ask you what that is, if you know?

A. Well, it's an agreement between the Rexall Drug Company and the druggist in Kensal, North Dakota, a Mr. Olig.

(Testimony of Thomas Henry Stark.)

Q. All right, sir. And was this agreement in effect, if you know, on February 5, 1955?

A. Yes, it was. [44]

Q. All right, sir.

Mr. Bradish: I offer this then, if I might, as Defendant's Exhibit B, your Honor, in evidence.

Mr. Lanier: We have no objection, your Honor.

The Court: Admitted.

The Clerk: Defendant's exhibit B admitted.

(Thereupon, Defendant's Exhibit B, previously marked for identification, was received in evidence and made a part of this record.)

Q. (By Mr. Bradish, resuming): Now, Mr. Stark, in your capacity as manager of the claim department of the Rexall Drug Company, do any claims made by anyone resulting from the use of any of your products come through your department? A. Yes.

Q. And, at my request, Mr. Stark, did you make an inspection of any claims that came through your department resulting from the use of any Cara Nome products following [45] February 5, 1955? A. I did.

Q. And in your inspection of those claims which were made based upon the use of any of the Cara Nome products subsequent to February 5, 1955, did you have any claim made by a person by the name of Mrs. Carl Carlson? A. No.

Q. Did you have any claim made by a person by the name of Mrs. Donald Carlson? A. No.

Q. All right, sir. In your experience as man-

(Testimony of Thomas Henry Stark.)

ager of the Claims Section of the Rexall Drug Company, other than this particular case that we are concerned with here, of Sandra Mae Nihill, have you had any other claims made to your company in which claim was made for complete loss of hair?

A. No.

Q. From the use of any Cara Nome set?

A. No.

Mr. Bradish: Thank you.

Mr. Packard: I don't have any questions, your Honor. [46]

The Court: Cross?

Cross Examination

Q. (By Mr. Lanier): Mr. Stark, you have just answered that you had no claim February 5, 1955, nor since, for the complete loss of hair?

A. No.

Q. Have you checked to see how many claims you had for damage to hair?

A. I did, Mr. Lanier. We have had—we average approximately eight claims a year.

Q. Eight claims a year?

A. Thank you.

Mr. Packard: Just one question.

Recross Examination

Q. (By Mr. Packard): Those claims have all been for breakage of the hair due to the use of a home permanent, or some type of cold [47] wave solution? A. That is correct.

(Testimony of Thomas Henry Stark.)

Q. Have any of those claims ever resulted in a claim for total, permanent, loss of hair, complete loss of hair? A. No.

Mr. Bradish: May I ask just one question?

The Court: Let me ask him one question before we go further.

Questions by The Court:

Q. Speaking of the eight claims, do you refer to the particular 181 lot here or to all claims together growing out of all Cara Nome preparations?

A. Out of all Cara Nome preparations.

Redirect Examination

Q. (By Mr. Bradish): When you say all Cara Nome preparations, how many different Cara Nome preparations do you handle?

A. Seven or eight.

Q. And insofar as those Cara Nome wave sets of the varying varieties are concerned, approximately how many Cara Nome [48] wave sets were handled by Rexall in the year of 1955?

A. To the best of my knowledge, I would estimate approximately four hundred thousand.

Mr. Bradish: Thank you.

Recross Examination

Q. (By Mr. Packard): You refer to approximately eight claims from Cara Nome products. There are other products under the name of Cara Nome than the home permanent, isn't that correct, sir? A. Yes.

Q. And the home permanents or cold waves are

(Testimony of Thomas Henry Stark.)

the only products which Mr. Lewis supplies to you, isn't that correct?

A. I believe Mr. Lewis supplies a hair rinse, or dye, to us as well.

Q. Could you name a couple of the other products——

A. Well, we make Cara Nome lip-stick, Cara Nome deodorant and Cara Nome facial cream.

Q. I notice on one of these "Anapac." Is that a Cara [49] Nome product?

A. Not to my knowledge.

Mr. Packard: That's all the questions.

Recross Examination

Q. (By Mr. Lanier): Mr. Stark, I just want to get one thing clear, which is a little confused in my mind and probably the minds of the jury. When I asked you the question, I asked you about Cara Nome wave solution. Now when you say about eight a year, are you speaking about Cara Nome wave solution? A. Yes, sir.

Q. In other words, that's not all Cara Nome products. You're talking about it averages about eight on the home wave solution? A. Yes.

Q. Did you make a check for complaints from batch 181? A. No, sir.

Q. So you don't know how many claims are against batch 181? [50]

A. The maximum, taking an average of approximately eight a year, Mr. Lanier, the maximum that could come from 181 would be eight.

(Testimony of Thomas Henry Stark.)

Q. All right, but you didn't check?

A. I checked every claim against a Cara Nome permanent of any type.

Q. So the maximum on any one year against batch 181 would be eight?

A. Well, we don't check them by batch numbers, Mr. Lanier. The batch number is unknown to us unless a question might arise, and the batch number would be stated on it. The approximate eight claims a year on Cara Nome permanents consists of all batches——

Q. Of Cara Nome home wave? A. Right.

Q. Of course a particular batch covers a particular period of time, does it not?

A. Not necessarily. Some of our outlets might have the stock on their shelves for sometime.

Q. How many batches a year, for instance, are put on the market?

A. That I couldn't answer, Mr. Lanier. We purchase it [51] under a purchase order, and I am not in the purchasing department.

Q. You actually are not qualified to answer that?

A. No. I have been informed by our merchandising department that we sell approximately four hundred thousand Cara Nome permanent kits every year.

Q. So as a matter of fact, you even get that information from somebody else?

A. Correct.

Q. And you don't know how many of four hundred thousand would be one batch or if it would be

(Testimony of Thomas Henry Stark.)

two batches and so forth? A. Correct.

Mr. Lanier: Thank you.

(Witness is excused.)

Mr. Packard: Mr. Lanier, I want to read the deposition of Gerald L. D'Amour.

Mr. Lanier: When was that taken? [52]

Mr. Packard: You were there; you asked some questions. In Jamestown, August first, the same time all the rest of them.

Mr. Lanier: That slipped my mind too.

Mr. Packard: D'Amour.

Mr. Lanier: Is that on the end of anyone else's deposition?

Oh, I remember it now. I remember that. Yes, I remember that now.

Mr. Packard: Let the record show that this deposition is the deposition of Gerard L. D'Amour, taken in Jamestown, North Dakota, August 1, 1957; that representing the plaintiff was Mr. Lanier and for the defendants was a Mr. Jungroth.

Whereupon,

DEPOSITION OF GERARD L. D'AMOUR

witness for the defendants, was read, Mr. Bradish reading the questions and Mr. Packard reading the answers, as follows: [53]

"Direct Examination

Q. (By Mr. Jungroth): Would you state your name, please? A. Gerard L. D'Amour.

Q. How old are you, Mr. D'Amour?

(Deposition of Gerard L. D'Amour.)

A. Thirty-two.

Q. What do you do?

A. I am a court reporter.

Q. Are you a court reporter for any judicial district in North Dakota? A. Fourth.

Q. For whom do you work?

A. Judge Harry E. Rittgers.

Q. Do you do any free lance work besides working for the judge? A. Yes.

Q. How long have you been a court reporter?

A. Almost ten years.

Q. Where did you go to school?

A. Chicago.

Q. Where was the first job you took reporting?

A. Chicago.

Q. For whom did you work there?

A. For a free lance reporter.

Q. And where did you go from there?

A. Jamestown, North Dakota.

Q. Now, Mr. D'Amour, at my instance and request, on the 3rd of February, 1956, do you recall accompanying me in my automobile to the home of Mrs. William Briss in the vicinity of Kensal, North Dakota? A. Yes, sir.

Q. While we were there do you recall that I contacted an individual named Mrs. William Briss?

A. Yes, sir.

Q. While there do you recall whether or not I visited with this individual with reference to a home permanent given to an individual named Sandra Mae Nihill? A. Yes, sir.

(Deposition of Gerard L. D'Amour.)

Q. With reference to my visit, did I instruct you to write down all questions propounded by me to Mrs. William Briss, and all answers given by Mrs. William Briss in response to questions asked by me? [55] A. Yes.

Q. Did you do that? A. Yes, sir.

Q. In the course of the questions that I asked Mrs. William Briss, do you recall checking your shorthand notes which you have with you whether or not I asked her whether any permanent wave solution of the permanent wave given to Sandra Mae Nihill on or about the 5th day of February 1955 was allowed to get into the eyebrows or forehead of the said Sandra Mae Nihill?

Mr. Lanier: I would imagine that there would be an objection there.

Mr. Packard: You imagine right. You did object.

Mr. Lanier: Yes. If the court please, that is objected to upon the grounds it calls for secondary testimony; it calls for a hearsay answer, no opportunity of cross-examination, and not the proper method of impeachment. It should have been done with the witness on the stand.

Mr. Packard: That's the reason we took the deposition, the witness isn't here. [56]

Mr. Lanier: If the court please, the witness was there and Mr. Jungroth was there at the time Mrs. Briss' deposition was taken.

Mr. Packard: Well, this is for impeachment.

Mr. Lanier: The proper method of impeachment

is to ask the witness himself whether this question was asked and that answer was given.

The Court: That's true. Objection sustained.

Mr. Packard: All right. Very well. That will be all.

Mr. Packard: Call Mr. Lewis, please.

Whereupon,

ARNOLD L. LEWIS

called on behalf of the defendant Studio Cosmetics, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Packard): Mr. Lewis, what is your present business or occupation, [57] sir?

A. Present occupation?

Q. Yes.

A. I'm a manufacturer of cosmetics.

Q. And for what period of time have you been a manufacturer of cosmetics?

A. Since about 1936.

Q. And, prior to that time, before 1936, what was your business or occupation?

A. I was in the beauty supply business.

Q. And when did you first go into the beauty supply business? A. About 1929.

Q. Are you a member of any cosmetic association?

A. Yes, I'm a member of the California Cosmetic Association, and by virtue of that membership I'm a member of the National Association.

(Testimony of Arnold L. Lewis.)

Q. And have you held any offices in any of those organizations?

A. I was President of the California Association in 1948 and again in 1953.

Q. And, in connection with these associations, do you [58] receive bulletins or journals.

A. Yes, the National Association which is located in Washington, D. C., issues bulletins regularly several times a week to all of their members disclosing various happenings in the industry, together with certain rulings which may come up from the Federal Trades Commission and the Federal Food & Drug Administration.

Q. Now, in connection with your business, sir, do you manufacture cold wave solutions?

A. Yes, we do.

Q. And when did these cold wave solutions first go on the market?

A. To the best of my recollection, they first appeared on the market in 1941.

Q. And have you familiarized yourself with the cold wave solutions put on the market by other manufacturers, other than yourself? A. Yes.

Q. And what is "thio"—is that what they refer to it in the trade? A. Yes, sir.

Q. Is "thio" contained basically as one of the ingredients in all of these cold wave solutions?

A. It is the basic ingredient in every cold wave solution on the market today.

Q. And I believe the evidence here has been that "thio", refers to thioglycolate acid, or the base

(Testimony of Arnold L. Lewis.)

that they convert into an alkali. Is that correct, sir?

A. Well, it becomes an alkali in the solution when it is prepared.

Q. Now, when did you first start manufacturing Cara Nome home kits?

A. I think it must have been about 1948 or '49, somewheres along there.

Q. And in connection with the preparation of these home kits, do you work under any type of a franchise agreement with anyone for the use of any patents and formulas?

A. Yes, we operate under the—a license agreement under the McDonald Patent relating to the use of thio in cold waving.

Q. And to your knowledge, are there any other manufacturers of cold wave solutions that work under the same licensing agreement with——

A. Yes. Several of the other large manufacturers in the country operate under the same license agreement. [60]

Q. In connection with this license agreement, are you furnished with the formula to be used in this particular solution? A. Yes, sir.

Q. Do you pay a franchise for the use of that formula? A. Yes, sir.

Q. And how many different type of cold wave home kit preparations do you presently place upon the market for Cara Nome?

A. For Cara Nome, we have about five different packages.

(Testimony of Arnold L. Lewis.)

Q. And are those different—will you please state what they are?

A. Well, they are intended for different types and textures of hair. The gentle being one type, the regular being for normal hair—I meant to say the gentle being for dyed and bleached hair and easy to wave hair; the regular is for the normal type of hair; super is for resistant hair and we have a little girl's package which is intended for use on children, little girls, and we have the pin curl permanent for a different type of wave.

Q. You have furnished me—I have here I think four cartons, or boxes, which you have referred to —the Cara Nome [61] natural curl pincurl permanent, and that's the one involved here, is that correct? A. Yes, sir.

Q. Then here's the natural curl, fast, regular, for normal hair. I notice a Cara Nome natural curl permanent for little girls, and a natural curl, fast, permanent, gentle, for easy to wave hair. Are those some of the products you put on the market?

A. That's correct.

Mr. Packard: I"d like to offer those, your Honor.

Mr. Lanier: No objection, your Honor.

The Clerk: Defendant's Exhibits C, D, E and F, marked and received.

(Whereupon, the four cartons in question, were marked Defendant's Exhibits C, D, E and F, received in evidence and made a part of this record.)

(Testimony of Arnold L. Lewis.)

Q. (Mr. Packard, resuming): Now, in connection with the compounding of your cold wave solution, do you have a chemist that prepares the solutions and makes them? A. Yes, we sure do.

Q. And, now talking about the pincurl permanent, the one in question here, under your license agreement and the compounding of this particular type of solution, what is the range of "thio" content, or thioglycolate content to be placed in that product?

Mr. Lanier: If the Court please, that is now objected to upon the grounds that it has obviously been testified to and it is not the best evidence. The man is not qualified as a chemist. The best evidence is obviously the formula given him by whomever he gets the formula from.

The Court: Well, he's the manufacturer. I'll permit him to testify.

A. Well I'm familiar with the formulas.

Q. Well I didn't ask you for the formulas, I just asked for—what do you normally——

A. A pincurl permanent?

Q. Yes.

A. A pincurl permanent is intended to be a casual type of permanent and has the strength from six and a half to seven and a half percent "thio" content, with the same 9.3 PH. [63]

Q. I believe Dr. Jeffreys explained the PH, but that's when it goes——

A. The alkalinity.

The Court: Is that what they call the neutralizer?

(Testimony of Arnold L. Lewis.)

The Witness: No, sir. It's the alkalinity of the solution itself.

The Court: Part of the substance in the bottle, what we saw——

The Witness: Well when the solution is finished, that is the alkalinity of it. We bring it up to that alkalinity point.

Q. (By Mr. Packard, resuming): Now you keep records pertaining to tests made of the various batches as they are placed on the market?

A. Well each time a batch is made—to begin with it has to be very carefully calculated for the "thio" content, and before the batch is finished, it has to be brought up to the alkalinity point by the addition of ammonia, and the thio content is then determined by chemical titration, the alkalinity is determined by Beckman's PH meter, which is an electrical device to determnie PH. [64]

Q. And was this done under a chemist at your plant? A. Yes, sir.

Q. And you keep records of each batch, as to the——

A. We keep a laboratory record of each batch, and with a code number covering each batch.

Q. Mr. Lanier, I believe, has the original of this document, which is—I show you a photostatic copy of the Studio Cosmetic Company's cold wave manufacturing record, and it has serial number 181, product, pincurl, dated October 22, 1954, and I ask you, Mr. Lewis, if this is a record kept in the normal course of business? A. Yes, it is.

(Testimony of Arnold L. Lewis.)

Q. And is this record kept under your control and direction? A. Yes.

Q. And that's in connection with the manufacture of your product, pincurl? A. Correct.

Mr. Packard: I offer this, your Honor, as Defendant's next in order.

Mr. Lanier: If the Court please, might I be permitted to ask a question or two preliminary to a possible objection?

The Court: You may. [65]

Mr. Lanier: Referring to the exhibit—what number is that?

The Clerk: Exhibit G marked for identification.

Q. (By Mr. Lanier): Exhibit G, Mr. Lewis, at the bottom of that exhibit, that is signed with the initials "L.G.M.". Will you tell me who those are?

A. That was a chemist that was in my employ at that time, by the name of L. G. Monteau.

Q. This is the same Monteau then that I have made several efforts to get the address. Is that correct? A. That's correct.

Q. And this entire batch was made under his personal supervision, direction and control?

A. Correct.

Q. And what actually went into that is known by him. Is that correct?

Mr. Packard: Well I object. It is not a correct statement, "that is known by him". The record speaks for itself.

(Testimony of Arnold L. Lewis.)

The Court: I suppose he wouldn't know it, only by the record Mr. Lanier.

Q. (By Mr. Lanier, resuming): First of all now, for instance, [66] in the original which I hold, of which you have a photostatic copy, would you tell me in whose handwriting that is filled out?

A. It's his handwriting.

Q. He is the one personally who filled this report out?

A. That's correct, but from our formulation.

Q. From your formulation?

A. Correct, sir.

Q. But nevertheless he filled this out according to what he said by this report—Exhibit G went into that 181.

A. This is his laboratory record.

Q. Of what went in to 181?

A. That's right.

Q. You, yourself, only go by the notations that are here as to what went into it?

A. Well if you mean that I stood there and watched every batch being made, I'd say no I didn't do that.

Q. But that was the chemist's responsibility?

A. That's right. That's why I employed him, for that purpose.

Mr. Lanier: It's objected to, if the Court please, upon the ground that it's not the best evidence, no opportunity of cross-examination. [67]

Mr. Packard: Ordinary record kept in the ordinary course of business, kept under his direction.

(Testimony of Arnold L. Lewis.)

The Court: I'll admit it in evidence.

The Clerk: Defendant's Exhibit G is admitted.

(Whereupon, the document referred to, heretofore marked for identification Defendant's Exhibit G, is received in evidence and made a part of this record.)

Q. (By Mr. Packard, resuming): Now, at the bottom of this record—first of all let me state, it says "Batch No. 181, Formula Number pincurl, batch size 325 gallons, date started, October 22nd, date filtered, October 22, '54, date filled October 22nd." Then it has here "Ammonium thioglycolate, 52.8%, quantity used 365 pounds, supplier Halby, Lot No. 2922". Who is Halby?

A. Halby is the manufacturer of the raw material—of ammonium thioglycolate.

Q. And then it shows all the ingredients in various proportions that go into that product—correct?

A. Correct.

Q. And at the bottom it has "Analysis. Finished batch." And then it has "thioglycolate acid 7.07", and it has [68] 3 ammonia——

A. Point-eight-five.

Q. And it has PH. A. Nine-point-three.

Q. Now, Cara Nome, I believe the testimony is, that's a brand name for Rexall's Drug. Is that correct?

A. That's correct; it's their brand name.

Q. I don't know whether I've asked you this, but for what period of time have you been furnishing Rexall with cold wave solutions?

(Testimony of Arnold L. Lewis.)

A. Well we furnished them with cold wave solutions under another brand name, prior to the Cara Nome name which we furnished them and which we have assigned to them, being the name "Helen Cornell". That brand name was furnished in the years 1946, '47 and '48, I believe.

Q. So we will understand how these products are bottled and shipped and so forth, during the time that you were handling this Helen Cornell, did you have an agreement of some type with Rexall to furnish them with all their cold waves?

A. Correct.

Q. And during the period of time, were you able to produce all of the cold wave solutions they needed themselves? [69]

A. No, our facilities were not adequate enough at that time to take care of their entire requirements.

Q. And so what did you do in order to obtain adequate facilities?

A. I made an arrangement with another company to have our bottles filled by them, and they in turn sent them to us. The formulation was identically the same as our formulation, and we labeled them and put them in the kits after we received them.

Q. And what Company was this?

A. That was the Toni Company.

Q. And have you run tests on their products to determine their chemical composition?

(Testimony of Arnold L. Lewis.)

A. Oh, yes; we spot-checked the shipments as they came in.

Q. And did they compare to your formula?

A. Correct.

Q. Now, have you manufactured any cold wave solutions by any other manufacturers in which you furnished the cold wave solutions or the product that they put out?

A. Primarily our business is a private-label manufacturing business, and we at one time manufactured cold waves for Leader Brothers, a product under the name of "Shadow Wave", which they distributed nationally for two or three years. [70]

Q. And did you use the same formulas or basic content——

A. We used the same formulas, of course.

Q. And have you continued to the present day to use the same formula?

A. That's correct.

Q. To your knowledge, have there been any complaints, other than the one we have here in question, about batch 181?

A. I have no knowledge of any other complaint from that particular batch.

Q. And have there ever been any complaints about any of the cold wave solutions that you ever put on the market, wherein any person claimed that they had permanently lost their hair, or permanent damage to their hair?

A. Never had any such complaint.

(Testimony of Arnold L. Lewis.)

Q. And how many of these kits do you put on the market annually?

A. Well, in the—for Cara Nome, I would estimate that we average about 450 thousand kits a year.

Q. Now, in connection with batch 181, I believe the evidence indicated it was compounded, filtered and packaged on October 22, 1954, and I believe it was 325 gallons. Now, how many bottles would that fill, do you know? [71]

A. The yield from that batch was about 10,400 bottles.

Q. And do you know where they were shipped?

A. Yes, I do. Our records were checked and about fifty percent of that quantity was shipped to the Rexall Drug Company in Chicago, and the balance of it was shipped to East Point, Georgia, which is also a Rexall point of distribution.

Mr. Packard: Now, I don't know whether this is a stipulation or not, your Honor, but as I recall—was it August 16, 1955—is that a stipulation, Mr. Lanier, the first notice that——

Mr. Lanier: No, the record shows July 5, 1955.

Mr. Packard: I don't think the record shows that, your Honor. Maybe I better ask the question.

Mr. Lanier: You have an exhibit, copy of a letter, in evidence, counsel, dated July 5, 1955.

Q. (By Mr. Packard, resuming): Let me ask you, Mr. Lewis, do you recall when you first had notice, or were [72] aware of the fact that a claim was being made by the plaintiff in this action?

(Testimony of Arnold L. Lewis.)

A. Well, I think the first notice I had on it was in August of 1955; I can't be certain.

Q. Mr. Lewis, I show you a document in the original file here, which is referred to as "Answer to Plaintiff's Interrogatories", which was filed with this Court on August 27, 1957, and in No. 5, Question No. 5, which you answered, it says "In what proportion are such ingredients placed in a bottle of the size alleged to have been sold to plaintiff herein". I believe your answer was, "Ammonium thioglycolate, 5%; aqua ammonia C.P. .75%; distilled water 94.25%".

Now, was that the answer that you gave in your interrogatories? Is that correct, sir?

A. Well I gave that answer based——

Q. Well, now, at the time you gave your answer, what was your understanding or belief as to the alleged type of cold wave solution that had been used by the plaintiff?

A. Well, I didn't have any information other than the fact that when the papers were served on me, it was [73] indicated that the plaintiff was a minor, and I assumed that the package for little girls—the home permanent for little girls had been used on this party. I had no other way of knowing anything different.

Q. Did you have any knowledge that it was a pincurl at the time you answered that question?

A. No, sir, that's why I answered that—I thought that was the little girl's and contained five percent.

(Testimony of Arnold L. Lewis.)

Q. Is that what the little girl's contained?

A. Correct, that's the content.

Mr. Packard: On that point, your Honor, I would like to offer the original Complaint filed on February 19, 1957, into evidence by reference on this particular point, your Honor, and as well as the amended complaint filed with this court on April 2, 1957, and both of those documents I would like to have offered into evidence by reference with the understanding that either party may read any portion they so desire, but I am not requesting that it go to the jury room.

The Court: Any objection? [74]

Mr. Lanier: If the Court please, I have no objection whatsoever. Of course if it's going to be marked as an exhibit and received, it has to be treated as all the other exhibits. I have no objection to them being so received.

The Court: I think it's proper to introduce a pleading which is part of the case by reference, so that if anybody wants to refer to it, they may be permitted to do so without objection. I'll receive the offer.

Mr. Packard: I don't particularly want it to go to the jury room. I tell you I'm in a position that I would like to put on the guardian ad litem and question him, but he isn't here. That's the spot I'm in.

I would like to read. I'm going to read to the jury from the Amended Complaint, which was

(Testimony of Arnold L. Lewis.)

filed on April 2, 1957, Paragraph 3, commencing on line 14, which reads as follows:

"That on the 5th day of February, 1955, plaintiff purchased from the Kensal Drug Company, of Kensal, [75] North Dakota, a bottle of said product of Cara Nome, which had been obtained from and through defendants", and may we have a stipulation, counsel, that that's the only reference made to this particular product as Cara Nome in the complaint, in the amended complaint?

Mr. Lanier: Counsel, if you will wait and let me get hold of these pleadings, I'll check along with you and see.

(Counsel examines pleadings.)

Mr. Lanier: Insofar as the amended complaint is concerned, counsel, yes.

The Court: Yes, what?

Mr. Packard: That the only reference to the product is made to Cara Nome. We have the same stipulation so far as the original complaint, I believe that's true?

Mr. Lanier: That's correct.

The Court: The only reference is in the original complaint? [76]

Mr. Packard: The original complaint and the amended complaint, the only reference to the product names it as Cara Nome.

The Court: In the original complaint?

Mr. Packard: And the amended complaint too. Both of them name it only as Cara Nome, and

(Testimony of Arnold L. Lewis.)

there's no designation as to what type of Cara Nome product.

Q. (By Mr. Packard, resuming): Then I show you plaintiff's Exhibit No. 2, a letter under the date of July 5, 1955, in which it states:

"A Miss Sandra Nihill has been to my office to make a claim against your company—this is to Rexall—as the result of the use of the Cara Nome natural curl kit, which has made her lose all of her hair", now, from the complaint and that letter, are you able to determine that this cold wave solution was a pin curl? A. No, sir.

Q. And when you answered the interrogatory referred to there, you assumed it was a child's, is that correct? A. Correct. [77]

Q. And, how does a pin curl differ from a natural curl home kit—in what respects, Mr. Lewis, do those differ?

A. Well, in giving an ordinary home permanent, the individual uses a plastic curler, that is a number of plastic curlers, sometimes as many as fifty or sixty to the head, depending on the amount of hair, and the solution is applied to each strand of hair as it is parted. In other words, they take a small strand of about an inch or three-quarters of an inch width, and out to the length of the hair. That section of the hair is moistened with the waving solution and then paper is applied to the ends of the hair and it is wrapped on curlers, rolled on curlers, that would be better to say, and then fastened with a rubber fastener, and when this process

(Testimony of Arnold L. Lewis.)

is completed, the curls are again moistened with the solution by use of a piece of cotton or an eye-dropper, and then the timing begins and, according to the type and texture of the hair when the timing is completed, the solution is rinsed, the head is rinsed. This is all done before the curls are taken off, and then the neutralizer is applied, and after the curls are taken off the neutralizer is again applied, and the wave is [78] then set in pin curls and allowed to dry. Now you asked me the difference, did you, between that and a pin curl?

Q. Yes.

A. A pin curl wave differs in this respect, that, first of all a pin curl is intended to be a loose casual type of wave because of a change in hair styles which occurred somewhere in 1954, along in that period of time. And this was a type of permanent which was devised to give a permanent curl to the hair, not to the degree of permanency of the other type of permanents, possibly the curl would only stay in six to eight weeks as opposed to four or five months with the other type, and this was developed with the idea being that you could set the hair in pin curls, apply the solution, apply the neutralizer and leave the hair up in pin curls until it's dry and then brush it into the desired style.

Q. Now, in any of these cold waves of the various types you have testified to, the fast, the general, the pincurl, and natural, do any of them carry instructions stating to pour the solution over the hair at the end?

(Testimony of Arnold L. Lewis.)

A. No, sir, we do not state that. That would be a wrong method of application. [79]

Mr. Packard: Where are those kits?

(The Clerk furnished counsel with the instructions contained in the kit.)

Mr. Lanier: Has that been marked?

Mr. Packard: What exhibit is it?

The Clerk: It's 1.

Mr. Lanier: Why don't you mark it 1-A.

(Whereupon, Defendant's Exhibit 1-A is marked for identification.)

Q. (By Mr. Packard, resuming): Now, in connection with your product, do you place any warning instructions, under conditions, that this Cara Nome natural curl pin curl permanent should not be used—do you have any warnings in that?

A. Yes, we state plainly in the instructions when this product should not be used.

Q. Please state what your instructions contain insofar [80] as that is concerned?

A. The first line, which of course is important, is to read this carefully before you start your pin curl permanent. If your scalp is sore, irritated or scratched, postpone your wave until this condition is corrected. If your hands are chapped, sore, cut or especially sensitive, wear rubber gloves while giving the wave.

Q. Read the next one. Read the instructions.

A. These are not the instructions.

Q. I know.

A. Keep pin curl lotion tightly capped at all

(Testimony of Arnold L. Lewis.)

times. Don't leave pin curl lotion and neutralizer where children or pets may get them. They must not be taken internally. Wait at least two months between permanents. Trim off ends of old permanent for a softer, prettier wave. The bobby pins supplied in this package are especially treated and should be used only once in giving a pin curl permanent. Use only new enameled bobby pins or aluminum curl clips if you need more curls. Pin curl lotion may turn purple when it touches some bobby pins, but neutralizer will correct this. Don't use any coloring products on [81] your hair for at least a week before or after a permanent.

Q. Then you have set forth without—and I don't want you to go through, the jury will have an opportunity to read these instructions, but, generally speaking what is the procedure set forth insofar as the giving of one of these cold waves?

A. For the pin curl?

Q. Yes.

A. Well after the hair is shampooed and while the hair is——

Mr. Lanier: If the Court please, I want to object at this point, purely for the purpose of saving time. The directions are in evidence. They speak for themselves.

The Court: I take it there is some explanation.

Mr. Packard: Well, maybe counsel is right, saving time. Rather than read all the instructions into the record, I thought he could just generally

(Testimony of Arnold L. Lewis.)

state. I was trying to save some time by having him to do it that way. [82]

The Court: Proceed your own way.

A. Well, in simple language, the hair is shampooed with a good shampoo, and while the hair is still damp——

The Court: You don't specify what kind and make of shampoo, do you?

The Witness: We state that they should use a good grade of shampoo.

A. (Resuming) And while the hair is still damp, the hair is put up in pin curls as diagrammed in the instructions. There are no curlers used in this wave, excepting at the back of the neck where the hair might be short, and we supply in the kit, six plastic curlers, with the end papers, so that those curls can be wrapped on the curlers, rolled on the curlers, because at that point it might be a little too short for them to pin curl. After the entire head has been pin-curled, and curlers in the back, then the solution is applied by a piece of cotton and each curl is thoroughly saturated with the solution. I'm speaking of the waving solution. Now, after a wait of ten minutes, the instructions call for look at the—taking [83] down one of the curls to see whether there is any pattern of wave which is described in the instructions, and if the pattern has already been established, then perhaps the time is sufficient. Some hair will take a wave faster than other hair, depending on its resistance, and it's cleanliness. Then if the timing has to con-

(Testimony of Arnold L. Lewis.)

tinue, they continue this timing and they put more solution on by use of the same method of applying it with the cotton or the eye-dropper and saturating each curl again. Following the finish of the timing period, the solution is then rinsed from the hair with warm water, the curls are not taken down at any time during this operation. When the neutralizer solution is applied to the hair, a wait of ten minutes is then prescribed again, and again the finish of the neutralizer solution is poured over the head into a basin generally with the head lying back so that the water will pour off towards the back. After this is completed, the hair is supposed to be again rinsed with warm water, clear water, and then all of this moisture then, or whatever moisture may be on the hair at that time, is supposed to be sopped up with a towel and the hair permitted to dry. After the hair dries [84] the pin curls are taken out—the pins are taken out—and the hair is brushed back into the desired style.

Q. Is there any particular instruction—or I should say there is an instruction which reads you should never leave the waving lotion on the hair for longer than thirty minutes?

A. That's correct.

Q. Now, you have seen these so-called guarantees, I am referring to this type of guarantee. Did you ever put those in your boxes, when you shipped them out? A. No, sir.

Q. When I say that I also refer to the green one too?

(Testimony of Arnold L. Lewis.)

A. No we have never put anything like that in our packages.

Q. And have you at any time paid for any type of advertisement for any Cara Nome products?

A. No, sir.

Mr. Packard: I believe that's all the questions I have, your Honor.

The Court: Do you have any questions Mr. Bradish?

Mr. Bradish: No, your Honor, not at this time. It's pretty close to the lunch hour, I think. [85]

The Court: Very well. The jury may pass, under the same injunction heretofore, not to talk about the case. Be back at two o'clock ready to proceed.

(Whereupon, the hearing in the within cause was adjourned until 2:00 o'clock p.m.)

Afternoon Session

(Whereupon, at the hour of 2:00 o'clock p.m., the hearing in the within cause was resumed pursuant to the noon recess heretofore taken, and the following further proceedings were had in open court:)

The Court: Proceed.

Whereupon,

ARNOLD L. LEWIS

resumes the witness stand for further examination, as follows:

Cross Examination

Q. (By Mr. Lanier): Now, Mr. Lewis, I be-

(Testimony of Arnold L. Lewis.)

lieve you stated that you manufacture for the Rexall Drug Company five different types of [86] permanent home wave solutions under the trade name "Cara Nome". A. Correct.

Q. And one of those being "gentle", so labeled?

A. Yes.

Q. One being "regular", for normal hair?

A. Right.

Q. One being "super"? A. Right.

Q. For particularly resistant hair?

A. Correct.

Q. And a fourth being a little girl permanent solution? A. Correct.

Q. Now of those four none of them are pin curl waves, are they? A. No, sir.

Q. And on those four, you have them labeled especially for different particular types?

A. Right.

Q. You only make one pin curl wave?

A. Correct.

Q. For all types? A. That's right. [87]

Q. So when we're discussing so far as this case is concerned, a particular type of wave that you make, which was used in this case, the pin curl Cara Nome wave, it is the only pin curl wave made, Cara Nome? A. That's right.

Q. All right. So we don't have to distinguish between types of hair and what not insofar as that pin curl wave is concerned?

A. Well only that the other types of permanents

(Testimony of Arnold L. Lewis.)

can also be used in the same procedure for pin curling.

Q. Does it say so?

A. It doesn't say so, but that is a known fact.

Q. A known fact to whom?

A. Well I think a known fact to professional beauticians.

Q. But not to people at home?

A. And people who have been giving themselves permanent waves for many years. They can use it for any method. A lot of people at home use them both ways.

Q. Do you recommend, on the other four solutions, going ahead and using them with pin curls without specific directions on how to use them?

A. We don't recommend it, but I know that they do it.

Q. All right. But, nevertheless, you make one pin curl [88] home permanent wave?

A. That's right.

Q. Now you have stated that you are testifying from your knowledge of certain formulas that you have a franchise to use. Is that correct?

A. Correct.

Q. Do you have a specific formula for the pin curl Cara Nome home wave solution—lotion?

A. No specific formula for pin curl anymore than we have a specific formula for any of the other types.

Q. Well now what do you mean by that, I understood that you did?

(Testimony of Arnold L. Lewis.)

A. The license doesn't cover the formulation, it covers the use of thio in permanent waving, as described in the McDonald patent.

Q. Do you have the formula with you?

A. No, sir.

Q. Can you produce it?

A. I can produce my own formulas. I can also produce the McDonald patents if that's necessary.

Q. I just want to make sure that I understand and that this jury understands, Mr. Lewis. I understood, if I'm wrong correct me, that you have a franchise for a specific formula for the making of the waving lotion. [89] Is that correct or not?

A. It's incorrect. Under a royalty agreement we can make permanent wave solutions under the McDonald patent, which provides for the use of thio in permanent waving solutions.

Q. All right. Then if I understand you correctly, that use of someone else's patent is something which you have a right to use? A. Correct.

Q. The specific formula, you, yourself, make up?

A. In the various strengths or the——

Q. Yes.

A. Formula is prescribed in the patent. I didn't make up the patent.

Q. But the exact amounts of it to mix in these mixing bowls of yours, you do?

A. You have a certain amount of laxity in the percentage of thio that you can use under those patents.

(Testimony of Arnold L. Lewis.)

Q. Exactly. And that is controlled by the chemist in charge of your plant?

A. Not necessarily. It's controlled by our determined formulations.

Q. All right. Now this Monteau, who actually had charge [90] of batch 181 that we're talking about, how long did he work for you?

A. He worked for us about nine years I think.

Q. About nine years. Now, did I misunderstand you or did I not, did you say something about the Rexall formula?

A. I don't recall saying that.

Q. Is there any such thing as the Rexall formula? A. Not that I know of.

Q. You would not so refer to it? A. No.

Q. Now, you also referred to the fact that back in 1946, '47 and '48, you were furnishing a whole cold wave solution, for Rexall Drug, named Helen Carnell? A. Correct.

Q. And that sometimes you would manufacture it and at other times you would, I suppose, call farm it out, is that right?

A. Well as I previously stated, our facilities weren't adequate to supply the quantities required, and we had to call upon another firm for additional supplies.

Q. And that particular firm back there in '46, '47 and '48, that you called upon, happened to be Toni?

A. That's correct.

Q. And Toni in supplying it for you, I suppose

(Testimony of Arnold L. Lewis.)

supplied the same thing that they use for their Toni? A. Correct.

Q. So that all this advertising and what not to the public really doesn't mean much, does it?

A. I don't know what you mean by that.

Mr. Packard: I object. That calls for a conclusion of the witness.

The Court: I think I'll permit him to answer it.

Q. You don't know what you mean——

A. I don't know what you mean.

Q. In other words, when a buying public depends upon the name "Cara Nome" or the name "Toni" or what not, it might be "Kee-We" or something else?

A. Well this was common procedure in the cosmetic business. Many firms are in business and make at least maybe a dozen or two dozen different products—the same products for two or three dozen different firms.

Q. All the same, except they put a different label on it?

A. Pretty much the same, I'd say.

Q. Yes. In fact identical, many times? [92]

A. Lots of times it's identical.

Q. Just a question of what label you want to put on the bottle?

A. Sometimes they change it in some aspect, probably they put perfume or they color it, something of that nature.

Q. Do you know how many batches of pin curl Cara Nome home wave you have made in this year of 1958?

(Testimony of Arnold L. Lewis.)

A. Well I can't be certain. I imagine we have made several batches.

Q. I don't mean "imagine." I want to know if you know.

A. I can't be certain. Without going to the records, I wouldn't know.

Q. You don't know.

Mr. Packard: I object. This is immaterial, irrelevant and incompetent.

Q. Now, when you speak of 450,000 kits a year, you are speaking of all five of your Cara Nome?

A. Correct.

Q. How many pin curls?

A. Approximately ten percent of that total.

Q. In other words, we are speaking actually of about [93] 45 thousand kits—correct?

A. I would say about that.

Q. And in any one given batch about 10,400?

A. Well that particular batch yielded 10,400.

Q. All right. Which, then, would be about a fourth of your yearly output in that one batch so far as pincurl is concerned?

A. A fourth—what do you mean by that?

Q. You state about 45 thousand——

A. Oh, I understand yes.

Q. About a fourth?

A. That's approximately correct, yes.

Q. Half of that batch went somewhere in Georgia, and half of it somewhere in Chicago?

A. It went to Chicago, and one went to East Point, Georgia.

(Testimony of Arnold L. Lewis.)

Q. For distribution from Georgia in that southern area, and for distribution from Chicago, in that central area?

A. Midwestern area, I presume.

Q. Now, these various waves—let's take the little girl's home wave. That is made up and used for little girls of what age?

A. I didn't understand you. [94]

Q. The little girl's wave? In going through these five different types, that is made up from your manufacturing company, for Rexall Drug, under the tradename Rexall-Cara Nome, for little girls?

A. Correct.

Q. What age little girl?

A. Oh, I don't know what age could be defined as a little girl; I imagine it's about age sixteen or seventeen, from about five to seventeen.

Q. That's what you consider a little girl?

A. I always considered that. I considered my daughter a little girl.

Q. I show you Plaintiff's Exhibit D. Want you to look at the picture on the outside. It that the little girl which you make up that particular formula for? A. That's correct.

Q. Does that look like a sixteen or seventeen year old?

Mr. Packard: I object. This is argumentative.

The Court: That's argumentative.

Q. But that's your advertising. That's what it's meant for, is it not, as it appears on Exhibit D?

A. That's it exactly, that's the package.

(Testimony of Arnold L. Lewis.)

Q. Now at the time that you answered the Plaintiff's interrogatories, which counsel was asking you about, and at which time in answer to the percentage that was in the Cara Nome permanent wave, that you said five percent, I presume that, in the first place, you got the questions to those interrogatories from your lawyer, did you not?

A. That's right.

Q. And I presume that they were made out, naturally, with his help and assistance?

A. You mean the answers?

Q. Yes.

A. Well I answered them as he questioned me. I don't think he gave me any help.

Q. That's what I mean. Don't get me wrong Mr. Lewis. I don't mean he answered them for you, but I mean he was there at the time? A. Yes.

Q. And as a matter of fact, probably done in his office, was it not? A. I believe it was.

Q. And the actual date on them was August 26, 1957. Is that correct? [96]

A. I can't answer that, if it's marked though, that would be the date.

Q. Showing you the last page, page 7, is this your signature?

A. Is this the interrogatory you are asking me to look at?

Q. Yes. There's page 1. You can look at them.

A. That's right.

Q. And this is your signature?

A. That's right.

(Testimony of Arnold L. Lewis.)

Q. And that is notarized and dated the 26th day of August, 1957—correct? A. Correct.

Q. All right. Now, then, I also show you in the official files Defendant's Memorandum of Contentions of Fact and Law, and ask you what date appears on the fifth page of that?

A. What is the document you are referring to? The date appears to be the 26th.

Q. 1957? A. Correct.

Q. Of August? A. That's right. [97]

Q. The same date? A. That's right.

Q. All right. In that document, the following is stated: "The defendants contend that if plaintiff followed directions contained in the Cara Nome Natural Curl Brand Pin Curl Permanent"—correct?

A. That's what it states there, but this is the first time I've ever seen this document.

Q. All right. That's what it states. So at least you were in your lawyer's office on August 26, 1957. Is that correct?

A. That's right. I beg your pardon. I may not have been in there on that date. I may have signed that on that date. I may have been in there a few days earlier than that.

Q. Well at least it's obvious that on the same date your lawyer knew we were talking about pin curl permanent.

A. No, it isn't necessarily obvious——

Mr. Packard: I object. That's argumentative. Assuming facts not in evidence.

The Court: It's argumentative. [98]

(Testimony of Arnold L. Lewis.)

Mr. Lanier: Now, if the Court please, I would like to read into evidence—going to introduce it if necessary, the same as he did with the other exhibit —the fact that in the defendant's Memorandum of Contentions of Fact and Law, dated August 26, 1957, signed by Mr. Backer, of the defendant firm, and filed with this Court on August 27, 1957, that in four, five, repeated paragraphs on page 2 thereof, it is specifically referred to as the bottle involved in this case being "Cara Nome Natural Curl Brand Pin Curl Permanent."

Mr. Packard: Your Honor, if I may object upon the basis that there is no proper foundation laid to show that the defendant in this action, Mr. Lewis, had the same knowledge the attorney did, and the question says "alleged," and it was alleged in the complaint and on this notice. I mean just because an attorney files a memorandum of law it doesn't mean that Mr. Lewis, in his answer, is bound by the knowledge of the attorney.

The Court: Not necessarily so, and yet I think it's proper to go into the record for whatever it's worth.

Q. (By Mr. Lanier, resuming): Now, is it not the truth, Mr. [99] Lewis, that at the time your Company manufactured the pin wave solution and lotion involved in this lawsuit and at the time that it was delivered for retail sale to the general public, and at the time that you answered these interrogatories, that you thought that there was five percent solution of ammonium thioglycolate?

(Testimony of Arnold L. Lewis.)

A. No, sir, that it not the truth.

Q. That is incorrect?

A. That is absolutely incorrect.

Q. All right. Now in your various steps in your directions, Mr. Lewis, which you have them basically one, two and three, I believe—correct?

A. Correct.

Q. With various subdivisions underneath them. First of all No. 1 is speaking of the shampooing and the pin curl setting—correct? A. Yes.

Q. And No. 2 speaks of the steps in applying the pin curl lotion—correct?

A. May I have one of the directions, so I can follow your questions?

Q. Surely.

A. I have one in my pocket, may I use it? [100]

Q. Yes, surely. Now, I am referring to Exhibit 1-A and I am presuming—and I'm sure they are, at least all I have ever checked—that the copy you are holding is the same. Now, step No. 2, with its various sub-divisions in it and under it, apply to the application of the pin curl lotion—correct?

A. Yes.

Q. And that is referred to as a lotion?

A. Correct.

Q. All right. Now that is the lotion in which there is the ammonium thioglycolate?

A. Correct.

Q. And in whatever percentage we are talking about—correct?

A. That is the thio solution, that's correct.

(Testimony of Arnold L. Lewis.)

Q. Correct. And it's referred to as a pin curl lotion? A. Umhum.

Q. Now, when you come to No. 3, that and its various steps under it, are the neutralizing steps—correct? A. Yes, sir.

Q. And there again we refer to the neutralizing solution—correct?

A. Neutralizer solution, that's right.

Q. Correct. Now, then, in the second step in that, do [101] I read correctly when I say "Now pour the remaining neutralizing solution through the hair, catch it in a bowl, and use fresh cotton to saturate all the curls repeatedly."

A. You didn't read it correctly.

Q. Would you read it please?

A. "Pour half of the neutralizing solution into a large clean bowl and with fresh cotton saturate every curl thoroughly with neutralizing solution."

Q. Well now you're reading step No. 1, are you not? A. I'm reading step No. 3.

Q. All right. You're reading the first subdivision under 3.

A. There's just one paragraph under 3.

Q. Now go to step 2. Would you read it please?

A. Back to applying the pin curl lotion?

Q. The neutralizer. Step No. 3, paragraph 2. Would you read it.

A. Oh, I beg your pardon. "After the wait of five minutes?

Q. Correct.

A. "Now pour the remaining neutralizer solution

(Testimony of Arnold L. Lewis.)

through the hair, catch it in a bowl, and use fresh cotton to [102] saturate all the curls repeatedly."

Mr. Lanier: That's all counsel. Excuse me counsel, one more minute. Sorry, your Honor. There is something here I did want to check on. I think possibly I better come over here, your Honor, so the witness can see to what I am referring.

Q. (By Mr. Lanier, resuming): In this same interrogatories which you answered on August 26, 1957——

A. May I correct that? I may not have answered it on that date. I probably signed a typewritten copy on that date which the attorney filed. The date shown is the 26th and that is the date I perhaps signed it and appeared before the notary on that date to have my signature notarized. I know that I answered it several days before the date that I signed it.

Q. At least that is the date that you signed it?

A. That is correct.

Q. All right. Now, I want to ask you, on that date or whenever it was that you filled out these interrogatories, at least the ones we are speaking of, if you were asked the following question and gave the following answer: "If your answer to the foregoing question is that you don't know because you have not seen the bottle, if you [103] are shown the alleged bottle would you be able to say?" And your answer is—no

(a) "Whether or not you manufactured a product sold in such a bottle?"

(Testimony of Arnold L. Lewis.)

Your answer was—

"If shown the bottle I would be able to state whether or not that bottle was actually filled with our product."

(b) "What the ingredients therein are?"

Answer—

"The ingredients would be as heretofore stated.

(c) "Are the ingredients in the same proportions in all such products?"

Answer—

"Virtually the same."

Did you or not have those questions asked and did you so answer?

A. Yes I answered that and that's absolutely correct. They are virtually the same.

Q. Do you recall that in that same interrogatories, the following question, on page 4 counsel, at line 22, was asked and the following answer given:

Question—"Has the product, Cara Nome, been submitted to specialists in the medical profession on hair and scalp, together with the list of ingredients and proportions [104] used to determine what effects would be on hair and scalp?"

And your answer was "No."

Do you remember that question and answer?

A. That's right.

Q. Mr. Lewis, do you recall the following question and answer being given—page 5 counsel, line 16:

"Did defendant, Rexall Drug Company, before en-

(Testimony of Arnold L. Lewis.)

gaging in the distribution of said product, familiarize itself with the ingredients in said product?"

Mr. Packard: Well, now, I object to that. It certainly would call for a conclusion of this witness, whether Rexall did something.

Mr. Lanier: I believe that's true, your Honor. I'll withdraw that question and use it in another interrogatory in rebuttal.

That's all.

Mr. Packard: I don't have any further questions.

The Court: That will be all, Mr. Lewis.

(Witness is excused.) [105]

Mr. Packard: Defendant rests, your Honor.

The Court: Are all your exhibits in?

Mr. Packard: I want to offer this diagram.

The Court: What's the number?

Mr. Packard: Defendants' A.

Mr. Lanier: I have no objection.

The Court: Defendants' Exhibit A is admitted in evidence.

(Whereupon, the diagram, heretofore marked for identification, Defendants' Exhibit A, is received in evidence and made a part of this record.)

Mr. Packard: I rest, your Honor.

Mr. Bradish: Defendant, Rexall, rests. [106]

Mr. Lanier: Just one thing, your Honor. I would like to read into the record from the interrogatories of Thomas H. Stark, Assistant Manager Insurance & Tax of Rexall Company, at page 2.

Mr. Bradish: Well now, just a minute. What is

the purpose of this being read into evidence? If the purpose of it is for impeachment, I object on the ground that there is no proper foundation laid.

Mr. Lanier: It's not offered for impeachment. It's offered for substantive evidence, your Honor.

Mr. Bradish: Witness Stark was here, your Honor, on three different occasions. I don't know what he is going to read. What are you going to read?

Mr. Lanier: Question 14—the question and answer. All questions in depositions and interrogatories, your Honor, if material, are admissible.

Mr. Bradish: I'll stipulate you can read No. 14 question and answer. [107]

Mr. Lanier: Well then we don't have any argument, do we counsel?

Mr. Bradish: Not right now we don't, but we are going to in a little while.

The Court: You may read it in Mr. Lanier.

Mr. Lanier: "Question: Did defendant, Rexall Drug Company, before engaging in the distribution of said product, familiarize itself with the ingredients in said product?"

"Answer: Yes."

Mr. Lanier: Plaintiff re-rests, your Honor.

Mr. Packard: May we approach the bench, your Honor?

The Court: You may.

(Whereupon, counsel for the respective parties and the reporter approached the bench and the following took place out of the hearing of the Jury:) [108]

Mr. Packard: I anticipate I will have certain Motions and I don't know whether your Honor will want to discuss instructions also, and I have in mind it may take pretty much of the afternoon.

The Court: I think I will excuse the jury then. Is that satisfactory?

Mr. Lanier: It's satisfactory.

(Thereupon, the following proceedings were had in open court:)

The Court: We've come to the end of the evidence finally—not the end of the case by any means. You are still under injunction not to talk about the case or try to make up your minds about the ultimate result until you've heard the arguments of counsel and the instructions of the Court, but there are certain matters between the Court and counsel that will take a little time and I don't see that it's worth while to keep you here for little time I might have before four-thirty, so I think I'll [109] excuse you at this time and you may go on until ten o'clock tomorrow, and we will have you back in the jury box as quickly as we can reach you in the morning, after ten o'clock. Don't talk about the case to anybody or try to decide it.

(Whereupon, the jury was dismissed until ten o'clock a.m., April 15, 1958, and the Court, counsel for the respective parties, the reporter and the clerk, retired to Chambers where the following proceedings were had:)

Mr. Bradish: If I might just say one thing, your Honor, I think our job here has been reduced possibly by about fifty percent, because I notice by the

amended instructions proposed by Mr. Lanier that he appears to be abandoning any cause of action that he might have against Studio Cosmetics Company for breach of warranty, and he appears to be abandoning any cause of action which he might have against Rexall Drug Company for negligence.

Mr. Lanier: That is right, your Honor.

The Court: I saw some later instructions. I thought you backed up on that and changed your mind. Maybe I didn't read them—— [110]

Mr. Lanier: I might go a little bit further than that, your Honor, by withdrawing two more before we're through.

Mr. Bradish: Two more what?

Mr. Lanier: Instructions.

Mr. Bradish: As I gather it then, for the record, the Count No. 1 in negligence against Rexall is dismissed and Count No. 2 for breach of warranty against Arnold L. Lewis doing business as Studio Cosmetics Company is dismissed. Is that right?

Mr. Lanier: That is correct.

Mr. Bradish: So, we now have a situation where the case is proceeding against Lewis on Count 1 and against Rexall Drug on Count No. 2.

Mr. Packard: I think that the record should show that that is with the consent, or that's the theory of Mr. Lanier, that he is abandoning Count No. 2 as against Lewis, that is warranty, and No. 1 as against Rexall, as to the negligence, and he is proceeding at this time as [111] against Lewis on Count No. 1 for negligence and against Rexall for breach of warranty.

Mr. Lanier: That is correct. And with that, and while we are doing that, I might just as well for the record withdraw, and I do withdraw Instruction Requests Nos. 9 and 10 because we are also, so far as these instructions are concerned, and the theory under which we are now proceeding, abandoning any claim against either party under an implied warranty.

Mr. Bradish: Good. 9 and 10 then are withdrawn.

Mr. Lanier: Correct. Now, may I state to the Court, while we are doing this, and for the record, that I have felt at all times, and I do now still feel, that this action will lie against both parties for breach of express warranty and for breach of implied warranty and for negligence; but in order to protect this record and to simplify these instructions and to be as unconfusing to this jury as possible, I have totally abandoned implied warranty by my instruction request and I have abandoned holding the Rexall Drug Company for negligence under Count 1, and I have abandoned holding the Studio Cosmetics Company for breach of warranty under Count 2. [112]

The Court: But you are insisting on negligence as against Studio Cosmetics Company on Count 1 and express warranty as against Rexall on Count 2.

Mr. Lanier: Correct, your Honor.

Mr. Packard: I guess the record speaks for itself and there will be no point in making the motions to dismiss that we intended to make when we came in here on those particular counts.

The Court: That is a pretty fair surmise.

Mr. Bradish: We are certainly agreeable to the abandonment or the dismissal of those counts——

The Court: If you want to protect your record, you might make those motions—I mean as to the ones which remain.

Mr. Lanier: Yes. Counsel, there is only one question I have in there and, frankly, I do not care how you do it. I just thought that your whole record for both of our purposes might be better under proper instructions rather than a dismissal if you have a verdict finding [113] for the defendant under Count 1, and for the defendant——

The Court: You mean a verdict by the jury, Mr. Lanier?

Mr. Lanier: Yes. I don't care how it's done.

Mr. Bradish: I think a dismissal is certainly a disposition actually on the merits under our procedure, and——

The Court: Well, suppose the order is like this, in view of the statement made by counsel for the plaintiff: Count 1 is dismissed as to Rexall Company, and Count 2 is dismissed as against the Studio Cosmetics Company. I think the order of the Court——

Mr. Packard: That's what I wanted in the procedure, I want the order of the Court to take care in view of Mr. Lanier's statement. The court will make such an order.

The Court: I'll make such an order now.

Mr. Packard: Then, let the record show at this time, the defendant Arnold L. Lewis, doing business

as Studio Cosmetics Company, moves the Court for a directed verdict as to [114] Count 1, the only count remaining as against said defendant, which is based upon negligence. Said defendant urges said Motion for a directed verdict upon the basis that plaintiff has failed to state or to prove a prima facie case as against the defendant on the basis of negligence; taking all the evidence in the case and drawing all the reasonable inferences in favor of plaintiff's case, they have still failed to prove a prima facie case on the theory of negligence. Now, your Honor, there has not been one iota of evidence in this case showing any negligence on the part of the Studio Cosmetics in the preparation, mixing, compounding of this particular solution. All the evidence in the record here has been produced on behalf of the defendants themselves showing the chemical composition. The evidence clearly shows that seven percent is within normal range. It is accepted in the industry as being the percentage of thioglycolate acid contained in these products. There has not been one bit of expert testimony offered by plaintiff here showing that the chemical composition, as compounded by the defendant, did not meet the standards accepted in the industry as being within normal limits. We had the testimony of Mr. Lewis who testified and stated that seven percent [115] was the average range, the normal, for this type of product. We further have the testimony of Dr. Jeffrey who is a highly qualified chemist, who would run production-control tests in this type of solution. He stated that they varied I believe from three and

a half to four percent to ten percent in their content, that seven percent was the average or the standard content for this type of solution—this type of product—and he further testified that he ran an analysis on this particular batch, the very batch from which the plaintiff received her cold wave and that it was six point nine four I believe, with a PH factor of 9.05, or within the normal range, as to both of those; that he ran another subsequent test on some of the products and it was practically the same. All the records show that when we bottled it, we ran our own tests and it was 7.07, which is practically the same. There has not been any evidence whatsoever to show that it didn't meet with the standard in the industry. Further, there is no showing, as your Honor probably read the Briggs case and some of these other cases, there has been no showing to the effect that a solution in this particular percentage was deleterious or that it was injurious to people, normal persons, and so forth. [116] There has been no evidence whatsoever on that. I mean the entire case is absolutely void of any evidence which will show any negligence on the part of the defendant. Now, I anticipate Mr. Lanier is going to argue in his position as to the effect that he is relying upon the doctrine of res ipsa loquitur, which I certainly strenuously urge is not applicable in this case; that this is not a res ipsa loquitar case, and that the doctrine has no place in this case, and there has been no evidence whatsoever of any direct negligence and the doctrine of res ipsa loquitur is not applicable because of the fact that in determining whether you are going to

apply the doctrine you have to weigh the probability, that the probabilities are such that they preponderate in favor of the fact that this injury would not have resulted if it had not been for the negligence of some person. We don't have that evidence here. We have three doctors, I believe, that stated there was alopecia areata, and Dr. Starr said fragilitis crinium, and I believe Dr. Michelson, part of his testimony was he found that condition too, fragilitis crinium; that all the doctors have testified that alopecia areata results from unknown causes. Now, there has been testimony of Dr. [117] Levitt and I believe Melton, that shock or nervous tension or something can be one of the causes that—I believe in Dr. Levitt's testimony — I had it written up — he stated that twenty-five percent of the cases result from shock; that the other seventy-five percent are unknown. So, certainly the probabilities of negligence as against the defendant do not preponderate wherein the doctrine would come into play in this case. Further, there has been a complete failure of foundation on the question of custody, care and control of the product from the time it left our plant, and so forth, and I submit to the court that the doctrine has no place in this case and there is no direct evidence whatsoever to show any negligence, and that a motion to direct a verdict should be granted as to the defendant Arnold L. Lewis.

Mr. Lanier: Motion is resisted.

The Court: Do you want to be heard?

Mr. Lanier: Not unless the Court wants to hear me.

The Court: He makes a rather convincing presentation of his side of the case. [118]

Mr. Lanier: Well, now, then in that case, your Honor, probably I better. No. 1, the law, insofar as the inference to be drawn from no direct proof of negligence, of course, must come from North Dakota. Fortunately, that's the only case—only point—involved in this lawsuit on which we do have laws in North Dakota. This is the type of case which is well recognized and one of the reasons that res ipsa itself is well recognized, that the proof of negligence is not subject to direct proof. The manufacturer has all of the facts and elements at his control. We have none of them. It's not subject to direct proof. The mere fact that one follows the proper formula doesn't mean it was followed properly; it doesn't mean that foreign ingredients didn't get into it; it doesn't mean that the bottom of the barrel wasn't scraped in some one particular one that came out. It is not subject to direct proof, in most cases. This one, fortunately, is stronger than any other one case that, at least, appears in the book. Even the Federal case in the Fifth Circuit or Sixth Circuit, I'm not sure which it is, from which our requested instructions for res ipsa loquitar is taken verbatim. I've taken the one which was approved by the Fifth Circuit [119] and have requested it verbatim as was approved in that case. That, of course, and the fact that it should be the strength, even further than that is the fact that we have here the proof, No. 1, Dr. Michelson—I'm talking about direct proof now, while I temporarily vary off the question of res ipsa, even before we get

to that—we have the direct proof of the defendant's own doctor, Dr. Michelson, who states positively that the damage to the hair and scalp here was caused by chemical interference. He states that he does not know, and can not say, whether that chemical interference was from within the body or without the body, but he states definitely that it was a chemical interference. Now, that is direct proof of their own testimony. There is the testimony of Dr. Martin, a physician, that in his opinion, from his examination, observation and treatment, that the loss of hair was caused by the hair wave lotion and application. We have the opinion of Dr. Melton that it was caused by it. We have the opinion of Dr. Levitt that it was caused by it. We have the further testimony of practically all the doctors, except Dr. Starr, who we don't even consider to be a dermatologist, but all the dermatologists, that this type of damage does happen to hair, and the opinion of all [120] of them that it is alopecia areata. That while it comes from causes unknown—let's call it seventy-five percent causes unknown—one of those causes of course could be chemical reaction from without. Because it's unknown, it could be any of them. About 25% of the causes being from shock. The opinion of Dr. Levitt that the loss of hair to the young girl thirteen years of age was so strong and was such a shock to her, that it caused alopecia areata, and that it is permanent. Even backed up by Dr. Starr in that in young people the loss of a parent or something of that type, causing emotional upset, can and does cause alopecia areata, backed up again by their

own doctor as the actual causal thing. We have the fact, which doesn't appear in any of these other hair cases—even in the one under which it went under res ipsa loquitur, against the Toni Company—the fact that two other people using the same probable batch even of the same drug store, of exactly the same product, the pin curl wave product, also had their hair burnt short to within an inch to where it was strawy, and they had that all cut off. Now in their case, it grew back. In this case you have the additional causation which, as we know, doesn't make any difference in law, of these actions whether the results can be anticipated or not. [121] Now all of those are direct, positive proof of negligence. You also have the fact that in his original interrogatories, which is now a matter that goes to weight, that he states that the solution is five percent. Upon the breakdown, we find it's forty percent higher than that, it's seven percent. Now that's a question to be believed or not believed by the jury as to whether or not they had intended to make it five percent, but actually upon checking it themselves found out that it was seven percent. It was too high. Those are all—they're voluminous insofar as direct evidence is concerned. But now let's take the North Dakota case and presume there was none of that at all, which is completely controlling on this case. There was a case which was just about as analogous to this without using hair wave itself, as any I can think of.

The Court: What was involved there?

Mr. Lanier: Chemical for spraying crops. Now,

in that case—and I might add it is one of the cases that I put on the desk for the court——

The Court: I saw it.

Mr. Lanier: (Continuing) ——but let me get it broken down here, Burt vs. Lake [122] Region Flying Service, 54 N.W. (2) 339——

The Court: Was that put on my desk?

Mr. Lanier: Yes. Now in that case, there were some 240 acres of oats sprayed. The oats did not become even totally killed so that their production was vastly deteriorated. It was not as good a crop as the oats alongside of it. And there a chemical was used for the spraying. The testimony shows that there was utterly no evidence of toxicity or harmfulness in the chemicals used. It shows that they were used exactly in conformance with the instructions, as given out by the North Dakota Agricultural College. The product itself was a product by the name of "Weedis". Now, here is the important part of the Court's law which was decided in that case——

The Court: You wouldn't know what page you are reading from?

Mr. Lanier: Well I could give you that. I am sure I can point it out to you in just one second, your Honor.

"While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray. There is no other reasonable probable explanation." [123]

The Court: This is a case in which the spray was manufactured and then put on by the same people, I assume.

Mr. Lanier: No, it was manufactured by a third party; put on by a third party. It was manufactured by one and put on by another, but the party putting it on was able to show he did it in exact conformance with the instructions issued by the North Dakota Agricultural College.

The Court: Well now wait a minute, that isn't what this says.

"While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray".

That must mean that the defendant made the application also.

Mr. Lanier: Defendant did make the application, yes.

The Court: All right. Proceed.

Mr. Bradish: The plaintiff in that case didn't have anything to do with the mixing. [124]

Mr. Lanier: Now, again counsel, of course, would be talking about evidence as to whether or not we are guilty of any contributory negligence in the way we applied it. That's another problem, but the point is, the Court holds very frankly that if there is no direct evidence of any negligence, that the inference can be made, and goes on to say further——

"Circumstantial proof relied upon need not be of

a degree to expel all other probabilities and will be sufficient to submit the issue to the jury if the proof coincides with logic and reason and with that which a reasonable mind would conclude from the testimony adduced. Proof of the fact of negligence may rest entirely in circumstances—it's North Dakota law—hence, negligence may be inferred from all of the facts and circumstances in the case and where circumstances are such as to take out of the realm of conjecture and within the field of legitimate inference from established facts, a prima facie case is made."

Now, nothing could be quite clearer or quite stronger where there is no evidence of negligence, where we have at least eight separate items of direct evidence of negligence, where here there is nothing. [125]

Mr. Packard: Is that all?

The Court: What we're talking about now is the application of the rule of res ipsa loquitur.

Mr. Lanier: That is no more than the fact that when a given set of circumstances present a causation that the inference that can be made is res ipsa.

The Court: Isn't this the circumstances under which it would become applicable, and that is that when you have met all the other possible conditions that would have caused the situation, and produced evidence that the particular thing was the proximate cause, then the rule of res ipsa loquitur applies.

Mr. Packard: That's correct, your Honor. That's the point I want to argue. Let's discard the de-

fendant's testimony, let's just take the plaintiffs for the purpose of this motion. Their own evidence by their doctor shows that she was suffering from a condition known as alopecia areata which—"yes, it's true that certain"—well it's possible her condition could have been caused—but there are other causes that could cause this damage that are unknown. That's the very reason that the doctrine is not applicable because in their [126] own memorandum, this Burt vs. Lake Region Flying Service, which counsel is leaning upon, it states:

"The evidence must present more than a mere possibility that the injury occurred in a particular way", and it goes on to say, "and that such evidence is sufficient to sustain a finding of a verdict". Now, the point I am arguing to your Honor is that to permit the case to go to the jury, it would call upon them to speculate and conjecture as to just what caused the condition in this girl's hair. In other words, are they going to say, "Well I believe she lost her hair by reason of this 25%, or was it 75%? They haven't got anything to work with insofar as what caused her hair condition.

The Court: Under any circumstances, they have to find this was the cause or else they are through.

Mr. Packard: That's right. They may be able to draw certain inferences as to proximate cause, but the thing that this record lacks is the basis upon which the court can instruct the jury on res ipsa to show they met all the conditions——

The Court: We spoke of that the other day. I made the suggestion. I don't think you agreed

with it, but it was [127] made, that if all of that becomes not a question for the court, but a question for the jury to determine, whether or not it was the proximate cause, if they found that it was not, of course that would end the case.

Mr. Packard: But in this case, your Honor, this case against Home Mutual Insurance——

The Court: On the strength of the North Dakota case, I'll let it go to the jury on the doctrine of res ipsa loquitur. If we get you in trouble Mr. Lanier on that, why——

Mr. Packard: I'd like for the record to show that under the Federal Rules you have to object and if the Court is going to instruct on res ipsa loquitur, I wish for the record to show that I make an exception to that and I claim it's error to instruct on the doctrine of res ipsa loquitur.

Mr. Bradish: Now, your Honor, comes my turn. On behalf of defendant, Rexall Drug Company, it's my understanding from the court's order dismissing the first count as to Rexall Drug, plus counsel's withdrawal of certain instructions, which proceed on the theory of an [128] implied warranty, that the second count as it now stands against Rexall Drug alone, sounds in the alleged—or attempted —cause of action for breach of an express warranty.

The Court: That's what I understand to be his position. Is that right, Mr. Lanier?

Mr. Lanier: That is correct, your Honor.

Mr. Bradish: Now, again, as was done at the conclusion of the plaintiff's case, I would like to move this court for a directed verdict in favor of

the Rexall Drug Company as to the second count on the grounds heretofore stated, which I'll repeat briefly—No. 1, on the ground that there has not been established the necessary requisite privity of contract between the plaintiff in this action and the Rexall Drug Company. Such requirement for privity of contract is of course necessary under our law as our cases interpret the Uniform Sales Act relative to warranties, which Uniform Sales Act has also been adopted verbatim in the state of North Dakota, and which, according to my information is contained in the North Dakota Revised Code, 1943, at Sections 51-0116, and which is set [129] forth in our California Civil Code, starting with Section 1735. The case law to support the California interpretation of the Uniform Sales Act as it applies to warranties is the case of Briggs vs. National Industries, Inc., 92 Cal. Ap. (2) 542, and also 207 Pac. 110, and also the case of Burr vs. Sherwin-Williams Company, which is a Supreme Court opinion in this state. I think it's about 1956 or '57, cited in 42 Cal. 2d at page 682. This was a chemical spray case damage to a cotton crop.

"The general rule is that privity of contract is required in an action for breach of either express or implied warranty, and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale".

Now, in our case we have the situation where Rexall is the distributor of this product which they

buy in sealed packages and which I might remind the court, none of the sealed packages or the printing on the carton of the package contains the word "Rexall" in any respect or any form. There is an absence of privity of contract insofar as the plaintiff and this defendant is concerned; and, secondly, I again remind the court that there has been a failure on the part of the plaintiff to prove any express warranty made by Rexall, [130] to the ultimate consumer in this case, either by direct evidence or by any circumstantial evidence, when you take into consideration our definition of express warranty as contained in the Uniform Sales Act. The only evidence offered is a guarantee which the plaintiff claims she received at the drug-store and also a copy of which she claims she received in the package itself, which merely states that if this cold wave permanent isn't as good as any others that they have used, the purchaser can return the product and receive double the purchase price back——

The Court: Well, isn't that rather effectively a guarantee of excellence?

Mr. Bradish: I hardly would think so, your Honor—not within the meaning of an express warranty. An express warranty is an affirmation of fact made by the seller to the buyer.

The Court: Do you have the statute there that has——

Mr. Lanier: He is getting that now, your Honor. The California court has so held, I might add too, in the case of Freeze vs.—— [131]

Mr. Bradish: Well, I'll take care of Freeze vs.

Sluss now. That was a case that Mr. Packard discussed the other day. That's an opinion from the appellate department of our Superior Court, and it in no way reflects the law as expressed by our District Court, or our Supreme Court—our Appellate Department. There has been testimony by the plaintiff's mother, who is not a party to this action, that she read some advertisements in the National Farm Weekly, which listed Cara Nome products, but she did not say what she read, she couldn't recall what she read, and she couldn't recall the issue of the year in which she allegedly read it. Now, in addition to having to prove an express warranty, within the meaning of the Code, counsel must also approve reliance upon the express warranty before the plaintiff can recover on that theory of the case.

The Court: Obviously they must have relied on something because they came there with their minds made up. They were going to buy it by virtue of some——

Mr. Lanier: They got both guarantees.

Mr. Bradish: Yes, but the guarantees were obtained after they bought [132] the product, your Honor, and there was no reliance upon the guarantee.

The Court: It was at the time I would assume; it was there with the display.

Mr. Bradish: You will recall the mother testified twice that she went into the drug-store for the sole purpose of buying this Cara Nome home wave set and when she went in there she hadn't seen any

guarantee. She went in there for that sole purpose and the only evidence which would tend to establish that she had seen any warranty and relied upon any of the warranties, was the evidence that she read an ad in the Farm Magazine prior to her going into the store, and she doesn't know what the ad was and we have no evidence—the best evidence—of what the ad contains, offered in evidence in this case. She merely said she saw Cara Nome products advertised and listed, and I submit to your Honor it might be an analogous situation to an advertisement by General Motors in which they set forth the different automobiles which were manufactured and sold by General Motors and such certainly would not be considered an express warranty within the meaning of our Code Section. That is the only evidence of any expression on the part of Rexall [133] which preceded the purchase of the Cara Nome home wave set.

The Court: Do you have that statute there?

Mr. Lanier: Mr. Rourke has gone up to the library to get it.

The Court: Have you got it?

Mr. Bradish: I was going to show you in Freeze vs. Sluss, which is the case that counsel refers to, in that case the guarantee was as follows:

"Frederick-Marguerita, All Purpose Granulated Soap. Guarantee of Quality. If Frederick's granulated soap does not meet with your entire approval, your dealer will cheerfully refund the full purchase price upon return of the unused portion."

Mr. Lanier: On what ground?

Mr. Packard: All they are suing for is to get their money back. There's no personal injury there. The plaintiff is suing here to get double their money back, and——

Mr. Bradish: I repeat my initial offer to this Court. When you asked me if I had anything to state when the so-called [134] guarantee was offered in evidence, and I told you that if counsel was proceeding upon the guarantee itself and wanted double their money back, I would stipulate to a judgment in the sum of twice the purchase price of the prodduct.

(At this point Mr. Rourke returned with the statute previously referred to.)

The Court: Where did you get that—in the library?

Mr. Rourke: In the library on the second floor.

The Court: 1735, Civil Code.

Mr. Bradish: 1732 defines express warranty:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

The Court: I saw that somewhere. Now where was it? [135]

Mr. Bradish: Section 1732 of our Civil Code. Now, your Honor, this guarantee says it's the best home permanent.

"If you don't agree that Cara Nome Natural Curl is better than any other home permanent simply mail the unused portion and container, together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, and we'll give you twice the original purchase price". This, mind you, is on the other side of one that has a similar guarantee for a cold remedy. Now that doesn't seem to me to be an affirmation of a fact. It's the seller's opinion as to the value of the product. Here are the boxes which I told your Honor contain absolutely nothing in the way of any warranties whatsoever and it is admitted that these boxes are not printed by Rexall. Rexall has nothing to do with them and Rexall's name doesn't appear anywhere on the box.

The Court: What I want to know is, does the evidence show anywhere how the little green guarantee got in?

Mr. Lanier: It was inside the box. By Mrs. Nihill's testimony, [136] when she purchased it, she reached in and took it out and read it.

Mr. Rourke: Before she purchased it.

Mr. Lanier: Before she purchased it, correct.

Mr. Bradish: She said—now I don't believe the evidence is that she looked at it before she purchased it, but even if she did look at it before she purchased it, the little green thing is identical to the other guarantee——

Mr. Lanier: Correct.

Mr. Bradish (Continuing): ——and her reliance, if any, must be based upon what she read before

she went into that store, because she went in there, she says, for the express purpose, sole purpose, of buying a Cara Nome wave set. So what she read in the store afterwards has nothing to do with her purchasing of that product. She went in there for that sole purpose—to buy it, and the only——

The Court: Couldn't it be that it confirmed her in her purpose? [137]

Mr. Bradish: Maybe it did confirm it, but that isn't what the Code provides. The Code provides that they rely upon the affirmation, and anything that she relied upon would have had to been displayed to her by advertising in the form of an express warranty before she went into the store. Now, the secret of the whole thing, and I think the clew of the whole thing, is when she testified that the results of the Toni were beautiful, and I asked her if the results of the Toni were beautiful why she went in for the sole purpose of buying Cara Nome. She said it was because Cara Nome had the pin curls. The pin curl type of cold wave; and I think the logical answer that can be drawn is they bought Cara Nome because it had a type for the giving of pin curls which apparently Toni didn't have.

The Court: Wasn't Toni a pin curl?

Mr. Bradish: No. Toni is a home permanent, but it's a different type. A pin curl is a separate type where they just get curls on the end.

Mr. Lanier: They have all types. [138]

Mr. Bradish: Not to my knowledge, Toni doesn't.

Mr. Packard: There's nothing in the evidence; we're all guessing.

Mr. Bradish: Nothing in the evidence.

Mr. Lanier: To show that there were other pin curls in that same store.

Mr. Bradish: I submit to your Honor that there is no express warranty here by Rexall to the plaintiff in this action or even to the plaintiff's mother——

The Court: What authorities are you relying on here, Mr. Lanier?

Mr. Lanier: I'm relying on the only one, your Honor, that's been presented to the Court—a recent case, thirty days ago, an Ohio case. My instruction offer on it is going to be worded identically as to that case. Further on that, when we're speaking of warranties, first of all you've got the advertising, you've got the testimony that in both '53 and '54 she saw the Rexall advertising; that she saw the Rexall Cara Nome advertising; that she saw even the particular paper, the Farm Journal. She makes the testimony that [139] she saw at the bottom, she said at the bottom of every one of the ads it says "You can depend on any drug products that bears the name Rexall". She said she relied upon that. That was the reason why she went there with her mind made up to get a Rexall permanent in the first place—a Cara Nome. She got there and she saw this special display, she saw this special large, Exhibit 7, on the display, took one, read it, opened the pin curl Cara Nome, looked inside of it and found inside of it the Rexall guarantee. Now she

becomes completely satisfied and relies on it again. I call the attention of the Court further that within that same box, within that same one, which she also referred to, in advertising "Cara Nome Natural Curl Permanents are Easier, Quicker, Safer——

Mr. Bradish: Your Honor, this is something put in this by the manufacturer and not by Rexall.

Mr. Lanier: It is a Rexall product. It has a Rexall guarantee within the very kit she bought. It is advertised in every bit of their own literature, in their Cara Nome pin curl; their own guarantee is opened and placed within the box. There is no question here but what they own this product and distribute it, there isn't any question on that. [140]

Mr. Bradish: Wait a minute. There is a definite question in view of the admissions of these parties in the pretrial order that this product was purchased in a sealed container from the manufacturer and was not opened, changed or altered in any degree by the distributor. What he was reading from is instructions put out by the manufacturer with this package, and to attribute that to Rexall as an express warranty seems to me to be torturing the law of warranty. An express warranty is an affirmation of fact by the seller and not by the manufacturer. Rexall had nothing to do with the preparation of these instructions, nor is there any evidence that Rexall had anything to do with placing this guarantee in the box. The only evidence is that she found it in the box, and when they attempted to get Mr. Stark to say that he seen them before, he said he hadn't ever seen

them before and, to his knowledge, Rexall didn't put them in the boxes. Now, if the independent druggists put them in the boxes, that certainly can't be charged as an express warranty to Rexall themselves.

Mr. Packard: I think Mr. Lewis testified that he did not put them in the boxes. [141]

The Court: He testified he didn't put the green——

Mr. Packard: Yes, that's right.

Mr. Bradish: And, your Honor, you will recall, I objected to the introduction of all these mats and your Honor indicated that you didn't feel that they had the necessary foundation laid to show that the lady read any of the ads which occurred in these particular mats, but you permitted them to go into evidence at Mr. Lanier's insistence, but I maintain that anything contained in these mats can not be used by this counsel as an express warranty because there's no foundation that his client, or her mother, ever looked at any of the ads that are contained in these particular exhibits.

Mr. Lanier: Counsel, both of those positions to me are ridiculous. No. 1, I have never heard anyone proclaim that when they have a product manufactured for their company, their use and distribution, exclusively, that they—when they guarantee it and put their own express warranty within the box—that they are not also guaranteeing and warrantying everything that's in that box. That's something entirely new to me. Secondly, [142] this is your advertising for '53 and '54, produced yourself—it, and all

of it. She read your advertising in '53 and '54. Now, how anyone can maintain that there is any question of admissibility on these, or that she saw ads similar to them—or these ads—and if these ads weren't there, the fact that you did advertise, the fact that she did read them and that she read what was in them, is an express warranty traveling to the bank.

Mr. Bradish: Now, just a minute. You made the statement that these were produced by us. They were not produced by us. They were produced here pursuant to a subpoena which you caused served upon a representative of the Owl Rexall. There has been no foundation. Certainly we can produce ads that we have made all over the United States, but in order for counsel or his client to rely upon express warranties, they must first prove that the warranty was made to the person seeking to invoke it; and, secondly, they must prove that that person relied upon that express warranty, and there's no foundation that any of the ads appearing in these documents were ever read by this lady, your Honor—none whatsoever. She said she read the National Farm Weekly, or whatever it is. She didn't know the month [143] or the year and she didn't know what she read other than she recalled seeing Cara Nome products advertised therein.

Mr. Rourke: And that they said "safer, faster and easier."

Mr. Bradish: They don't say "safer, faster and easier."

Mr. Rourke: That was her testimony, I don't know whether they say it or not.

Mr. Bradish: "You can depend on Rexall," now that is not an express warranty.

Mr. Lanier: Of course it's an express warranty. An express warranty of every single product appearing on that ad.

Mr. Bradish: I might cite counsel to the case of Lewis vs. Terry. It's an old case—Supreme Court case. The court held "When a tradesman sells or furnishes for use an article which is actually unsound and dangerous but which he believes to be safe and he warrants accordingly, he is not liable for injuries resulting from the defective or unsafe condition to a person who was neither a party to the contract with him nor one for whose benefit the contract is made." [144]

The Court: What is that citation?

Mr. Bradish: 111 Cal. 39. So, again, your Honor, my motion for a directed verdict proceeds on two grounds, namely, an absence of privity of contract and, secondly, that there was no express warranty made, nor any reliance on any express warranty proved by evidence. Now, counsel relies upon this recent Ohio case, which as has been indicated is a drastic departure from the general rules requiring privity, and counsel in so relying, I assume, is asking your Honor to disregard established law in California which interprets the same Uniform Sales Act as North Dakota does have, and he has no North Dakota cases interpreted, so I feel that, in the absence of a North Dakota case, in interpreting an identical statute that California has, I think the court should then follow the California inter-

pretation of the identical statute, and not go to a very recent decision in Ohio which, to my knowledge, hasn't yet been tested out in the——

Mr. Packard: That's the case which I read which indicated that the court stated they were on pioneering ground, and three of the justices, in their opinion—— [145]

The Court: Yes, I remember your discussion on it.

(Discussion off the record.)

Mr. Packard: There is a more recent case. 135 Cal. Ap. 2nd. "It may be conceded that an action upon an express warranty rests upon contract, but privity of contract is not necessary to an implied warranty when foodstuffs are involved, as here," then it cites California cases. As I read this case, just reading it, it says, "It may be conceded that an action upon an express warranty rests upon contract," and then they say "but privity is not necessary to implied warranty." So they must mean that privity is necessary in a warranty resting upon contract. That's how I read the case.

Mr. Rourke: There's a lot of implied warranty cases.

Mr. Packard: Yes, but that case, as I read it, says express warranty is upon contract, so——

The Court: That's conceded, isn't it?

Mr. Lanier: Any warranty is upon contract.

Mr. Packard: Yes, but the point is, that case says that express warranty is upon contract and they don't even discuss privity because they take it that everybody knows you have to have privity of contract if you're on express contract, and then

it says, but privity is not necessary upon implied warranty when you have foodstuffs.

The Court: Wouldn't you think that when a big company like Rexall nationally advertises its products and then gives a franchise to some little drug store to sell their products, that they go whole hog or none, that they expect them to sell as their representative or agent?

Mr. Packard: Here's the thing, your Honor. Can't you see how this Olig in North Dakota, at the Kensal Drug, North Dakota, he could come out and he could have told Nihill "Now you just take this home and you use this and if you find"—you can't possibly get hurt—I mean he can enter into his own contract. He is trying to sell the product as just a druggist.

The Court: There's no allegation of that sort. The allegation is the inducement was the advertising.

Mr. Lanier: Direct to the buyer. [147]

Mr. Bradish: Which has not been proved.

Mr. Lanier: You are arguing weight, counsel.

Mr. Bradish: I'm not either.

The Court: I'll permit it to go to the jury on the express warranty.

Mr. Packard: I would like for the record, your Honor, to show that I am withdrawing all jury instructions submitted to the Court based upon warranty insofar as Defendant Arnold L. Lewis, and I'm requesting the Court not to give any jury instructions in my behalf inasmuch as the matter has been dismissed.

The Court: I hope you will help me guard against that.

Mr. Bradish: I would suggest also, your Honor, I think that in view of your Honor's statement to the jury at the beginning of the case in which the jury was advised that the allegations alleged that Owl Rexall was guilty of negligence in failing to inspect these—test this product—that the jury now be advised that [148] issue of Rexall's negligence is no longer before them and not to be considered by them.

Mr. Lanier: I incorporated that in our Instruction 6, counsel.

Mr. Packard: I think he covered that in instructions, and we can argue that.

The Court: It shouldn't require any argument; it ought to be disabused before they start into the——

Mr. Lanier: That's why I incorporated that in the instructions.

Mr. Packard: We will have to argue it.

The Court: I think we ought to state the status of the case so far as the charges against the respective defendants before the arguments begin. Don't you think so?

Mr. Packard: Well I intend to, and I imagine counsel in his argument——

Mr. Lanier: I will be doing it and I'm sure he will.

The Court: The jury is going to be instructed too that they can't [149] take the lawyers' word for

anything, so you better let the Court do it. (Laughter.)

Mr. Bradish: Does your Honor care, for the record, and possibly for future briefs, to state whether or not your Honor is relying upon California law relative to privity of contract or upon Ohio law or upon what law insofar as express warranty is concerned?

Mr. Lanier: If the Court please, I don't think the Federal Court has to do any such thing as that.

Mr. Bradish: I didn't say he had to. I asked him if he cared to.

The Court: I don't think so. I do think that when there is no law in the state where the cause of action arises, and it's being tried in a foreign state, that the law of the foreign state should be given serious consideration, but I don't think it goes to the extent that it must control. That's what you are getting at?

Mr. Bradish: Yes, your Honor.

(Whereupon, the hearing was adjourned at 4 o'clock p.m., until 9:30 o'clock a.m. April 15, 1958, in Chambers.) [150]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court, Federal Building, in the City of Los Angeles, State of California, on April 15, 1958.

Court convened in Chambers at nine-thirty o'clock a.m. There were present at said time and place the appearances as heretofore noted.

Whereupon, the following proceedings were had:

Mr. Lanier: Will you let the record show, Mrs. West, that plaintiff withdraws instruction request No. 4? Instruction request No. 3 is amended [151] to show sixteen year, and a life expectancy of forty-five years.

The Court: Now 5.

Mr. Lanier: That, your Honor, is taken verbatim from Burt vs. Lake Region Flying Service.

The Court: Well this would include, of course, the res ipsa rule.

Mr. Lanier: I believe so.

Mr. Bradish: It's part of it, the way it's stated. Of course, I shouldn't say anything——

Mr. Packard: I'll object to it. I think that I have probably covered it in one of my instructions.

(Off the record.)

The Court: I don't see anything wrong with it Mr. Bradish.

Mr. Bradish: I, of course, stand in no position now, in view of the dismissal as to the Owl Rexall Drug Company of the cause of action sounding in negligence. [152] I don't have any standing to object.

Mr. Packard: I don't believe that's a correct statement of the law as to No. 5, "that direct, positive evidence as to the cause of the injury is not necessary." In other words, this is a res ipsa permitting reasonable inference. They have to prove their case by a preponderance of the evidence. You say "You are instructed that it is sufficient if the evidence of circumstances will permit a reasonable

inference * * *." Our cases hold there has to be some substantial evidence.

The Court: Circumstantial evidence can be substantial.

Mr. Packard: Yes, but that isn't what it says. It says, "evidence of circumstances will permit a reasonable inference of the alleged cause of injury and exclude other equally reasonable inferences of other causes." You are having the jury here with inferences among themselves——

Mr. Lanier: You're not instructing here on burden of proof; you're instructing here on cause.

The Court: Well do you have any objection, Mr. Packard, to the [153] word "positive" rather than "direct"? Is that the term you use in California?

Mr. Packard: "You are instructed that direct evidence as to the cause is not necessary." Well, you haven't got Bagi here, have you? There's an instruction that covers that much better than this.

Mr. Lanier: That's based entirely upon the North Dakota law, your Honor, in Burt vs. Lake Region Flying Service, and is the exact language of the court in that case.

Mr. Bradish: You are not going to get anywhere trying to compare an instruction from California based upon California law with counsel's interpretation of North Dakota law, and I think that if you note your objection, that's all that's necessary. I personally feel—have a feeling—that this instruction is error, but we can't resolve all of the claimed

errors at this time, all we can do is note our objections and let the——

The Court: Well I expect to give it.

Mr. Packard: Do you want me to note my [154] objections at this time or after?

The Court: No. Afterwards, because I might change my mind if I should find something in yours that covers it better.

Mr. Lanier: No. 6 has been amended, your Honor. 6 as given in the original already in the record, so you don't have to worry with it, has been withdrawn. And we have amended 6 in there which I suppose we should go to next.

Mr. Packard: Oh, you are going to amend 6 now?

Mr. Lanier: And that takes us over to 7.

The Court: And do you think, Mr. Lanier, that 6 as amended is just the way you want it?

Mr. Lanier: Yes, it is your Honor. I've been through it carefully, insofar as general res ipsa instructions are concerned——

Mr. Packard: I think this is on the record.

The Court: Beg pardon? [155]

Mr. Packard: I would like to have whatever we have in the record on 6.

The Court: Plaintiff's amended instruction 6 is under discussion.

Mr. Packard: And I believe the Court asked counsel whether he thought it was adequate as it is set forth.

The Court: Now, let me make a statement here, before we go on, so as to get my idea. Over on page 1, down toward the bottom of the page, I couldn't

quite follow the language down there. Now let's read it—"If you should believe from the evidence in the case——" I don't think you need to take what I say.

(Discussion off the record.)

The Court: Now, then, do you want to state your objections? Do I understand you want to state them now or later?

Mr. Packard: I'll do whatever the Court tells me to do on that. [156]. I want the record to show at this time that we are now discussing the instructions in Chambers and that I object to any instructions being given to this jury on the doctrine of res ipsa loquitur, as there has been no proper foundation laid for the use of said doctrine and it's not applicable in this case because there has been a failure on the part of the plaintiff to exclude, or introduce, any evidence which will exclude the other causes that could have caused this condition of alopecia areata which they own doctors testified to, and that two of their own doctors have testified that the cause of alopecia areata is unknown and their third doctor, Dr. Levitt, testified that in twenty-five percent of the cases you would expect to find shock and in the remaining cases it's unknown and therefore the probabilities do not tend to show or weigh in favor of the plaintiff that the cause was some negligence on the part of the defendant——

Mr. Lanier: Counsel, I wonder—I don't want to interrupt you now on these — but probably these things could take all day. Can't we just make our exceptions to the instructions? None of these are going to mean a thing anywhere else. [157]

The Court: Well, let him make his record. I think it's all right, and upon such objection being stated by Mr. Packard, the court announced that the instruction relating to the rule of res ipsa loquitur would be given.

Mr. Lanier: That takes us to instruction request No. 7 on the original.

(Discussion off the record.)

Mr. Lanier: Now 8 is already in the record, is withdrawn, and amended 8.

The Court: You have no objection to that second paragraph, have you Mr. Bradish?

Mr. Bradish: I most certainly have objection to the second paragraph because the second—you better take this—the second paragraph goes to the basis of my objection yesterday, and that is based upon a recent Ohio case which apparently ignores the——

Mr. Lanier: He is talking about the second paragraph. [158]

Mr. Bradish: Oh, the second paragraph. I have no objection to that, but the rest of it I do. I think the third paragraph doesn't properly state the law and I have requested two sections of the Uniform Sales Act verbatim.

Mr. Packard: May I, as a friend of the Court, inasmuch as I am not involved in the warranty, point out the vices of the third paragraph—that is if your Honor gave this instruction, you are instructing the jury that there was a written warranty. In other words, you are passing upon a question of fact which this jury has to pass upon,

when it says, "or in the written warranties delivered to the purchasers with the product." In other words, you are implying that a written warranty was given to the plaintiff I think by giving that instruction.

Mr. Bradish: And by written warranties is included the instructions for the use of the Cara Nome set which by the admissions in the pretrial order have no bearing upon Owl Rexall. Owl Rexall didn't make them, they didn't put them in the box; they had nothing to do with any [159] warranties that might have been contained in these instructions in the use of the Cara Nome set.

Mr. Lanier: If the Court please, the whole paragraph is prefaced with the fact of whether or not the jury finds. The entire question of their finding, whether there was any advertising, whether there was any guarantees within that advertising or in the written warranties delivered to the purchaser with the product, and if it made representation as to quality and merits. Now, I can see one possible thing counsel is talking about which I would have no objection to——

The Court: Before you go on with that, let me suggest the insertion after "liable" in the first line of the third paragraph, the words "under Count II of the Complaint." Otherwise submit the entire thing to the jury on that. Now you can go on Mr. Lanier.

Mr. Lanier: Well now then that part, that change is fine with me, your Honor, and I'm only thinking about counsel, and also again, so there won't be

any possible misunderstanding of these instructions "or in the written warranties delivered to the purchasers with the product [160] if you find such warranties were delivered with the product," I have no objection to putting that in.

Mr. Bradish: I think when you use the word "warranties," we are exceeding the province of the jury to determine whether or not any statements made amounted to a warranty as defined by the Uniform Sales Act. If you say in its advertising or in any guarantees in said advertising——

Mr. Lanier: Let's change the word "warranties," your Honor, which I am perfectly willing to do, and I think it may be a point well taken, to "written guarantees."

Mr. Bradish: You have already gotten that. May I suggest that you start with the word "or," and delete that over to and including the word "product." If you just say "Rexall Drug Store, in its advertising, or in any guarantees in said advertising, has made representation as to quality and merits of its products."

Mr. Lanier: Now, let's see, "or in any written guarantee delivered to the purchaser with the product if you find they were so delivered——" [161]

The Court: What about this "written warranties"?

Mr. Lanier: That we have changed, your Honor.

The Court: Have you taken it out? It was suggested, but I never heard any response.

Mr. Lanier: That paragraph will read—"To hold

the defendant, Rexall Drug Company liable under Count II of the Complaint——"

Mr. Bradish: Didn't you want to remove the word "liable," Judge?

The Court: No.

Mr. Lanier: (Continuing) "——you must find that the defendant, Rexall Drug Company, in its advertising, or in the guarantees in said advertising, or in any written guarantees delivered to the purchasers with the product, if you find such written guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer," and so forth. [162]

Mr. Packard: At the end it says "and thereby suffers harm in the use," should be "and thereby suffers damages as the proximate result of the use of said product."

Mr. Lanier: I have no objection to that either. I am perfectly willing to insert that.

The Court: Now read the whole paragraph.

Mr. Lanier: "To hold the defendant, Rexall Drug Company, liable under Count II, you must find that the defendant, Rexall Drug Company, in its advertising or in the guarantees in said advertising or in any written guarantees delivered to the purchasers with the product, if you find such guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such ultimate consumer does so purchase

in reliance on and pursuant to inducements of the defendant, Rexall Drug Company, and thereby suffers damage as a proximate result of the use of said product." [163]

Mr. Bradish: Well, your Honor, I have to object to it because it says "or in any written guarantees delivered to the purchasers with the product." Now counsel is going to rely, I know, upon these instructions in the Cara Nome set itself, which were not placed there by Rexall. Rexall had nothing whatsoever to do with them, and he is going to rely on the fact that that is a written guarantee delivered with the product, and if the jury is entitled to use the language in these instructions "delivered with the product," which Rexall had nothing to do with, they are permitted to find against Rexall on an express warranty which counsel will admit and has admitted, in the pretrial order, was never made by Rexall.

The Court: Who put the green guarantee in it?

Mr. Bradish: I don't know who put that in there.

The Court: Lewis says they didn't.

Mr. Bradish: Well, Rexall says they didn't either. I'm not talking about the green guarantee, I'm [164] talking about these instructions that go with the Cara Nome set which, admittedly, were not placed there by Rexall and had nothing to do with Rexall.

Mr. Packard: I think, your Honor, I think that it would be error to give this instruction stating "or in the guarantees in said advertising, or in any written warranties," because I think it implies that

there were guarantees and there were warranties, but I think if it just said "in its advertising has made representations as to quality and merits of its products." If you will strike out those two sentences, you will have it, "To hold the defendant, Rexall Drug Company, liable under Count II of the Complaint, you must find that the defendant, Rexall Drug Company, in its advertising, has made representation as to quality and merits——"

Mr. Lanier: I would never change the request that way.

The Court: All right, let's go on to the next instruction.

Mr. Bradish: Does your Honor care to indicate—— [165]

The Court: I'll get it.

Mr. Bradish: I just might mention one other thing. The instruction, in my opinion, is improper in that it refers to advertising to ultimate consumers but it doesn't set forth that the person claiming to have been damaged by reason of the breach of the express warranty has read the advertising and has relied upon it. We're concerned with the party claiming here and not the ultimate consumers in general, as the instruction——

The Court: What do you say, Mr. Lanier?

Mr. Lanier: It says in there—"* * * does so purchase in reliance on." You can't purchase in reliance on without having read——

Mr. Bradish: "and urges the consumer to purchase the product from a retailer." The consumer—he's talking about the general consumer.

The Court: By the ultimate consumer here, do you mean Sandra Nihill? [166]

Mr. Lanier: Your Honor, I don't think it makes any difference, because I think the same reliance is in operation.

(Off the record.)

Mr. Bradish: We have made the record. I will object to it again at the proper time. I think it's error; we are not going to resolve any problems here. You are going to give No. 8 as amended?

The Court: That's right.

Mr. Bradish: My objection will be noted at the proper time.

Mr. Lanier: And that goes to 9, and 9 and 10 have already been withdrawn in the record. That leads us to 11

Mr. Packard: Your Honor, on 11—does your Honor have 11?

The Court: I do have it.

Mr. Packard: Now, your Honor, I have no objection to 11, but I believe that is the instruction I was looking for in Bagi, which I stated would cover Jury Instruction No. 5. [167] I believe 11 should be given in lieu of 5.

The Court: What do you say about that Mr. Lanier?

Mr. Lanier: That's all right. I'll withdraw 5, your Honor. Let the record so show.

The Court: What about 12? Given.

Mr. Lanier: Now 13, your Honor, I give only for the benefit of the Court. As counsel has read it, I think that it is a correct statement, by way of

introduction. The Court may change it a million ways, I don't know; that's certainly up to the Court to state what the case is about.

The Court: I notice over on the second page, I don't think you want to refer to Count I so far as Rexall is concerned—"that the defendant, Rexall Drug Company, was negligent," that shouldn't be in there, should it?

Mr. Lanier: That should be probably that the defendant, instead of Rexall Drug Company, that the defendant Studio Cosmetics—— [168]

Mr. Bradish: I think you ought to strike any reference to Rexall Drug as being negligent in distributing said product and advertising and selling——

The Court: We'll take that out—mark it out.

Mr. Packard: I object to it; I think it's misleading.

The Court: I'm not putting your name in either.

Mr. Packard: I think it's somewhat misleading because it sounds like the Court is commenting on the evidence and summing up the evidence for the jury.

The Court: Well, suppose you leave that to me and you can make your objection later.

Mr. Packard: Okay, I was just pointing out. I think a lot of times if you go through what all the allegations of the complaint are and so forth, some of the jurors may get the idea that this is a comment by the Court upon what the evidence is in the case—— [169]

The Court: We'll probably get back to this in a fashion after we look at yours.

Mr. Lanier: 14. Counsel, I presume there is no objection to it, is there?

The Court: I marked out the "s" after defendant, in the fourth line from the bottom and I didn't quite understand the reach of the words "or both" down there in the next to the last line.

Mr. Bradish: I don't either.

Mr. Lanier: You have to start it out with a verdict against "either or both defendants," "if you find against either, or both, it will then be your duty—and only then—to award the plaintiff such amount of damages as will compensate her reasonably, and so forth.—Or the breach of warranty, if any," or both—it's "one or both."

Mr. Bradish: I think when you say "the breach of warranty——" [170]

The Court: "Any breach of warranty," I think.

Mr. Bradish: Breach of warranty, if any.

The Court: Yes, that's right. I think "if any" should properly go in after "warranty."

Mr. Lanier: Well now if we're going to do that, of course then after the "negligence of the defendant Studio Cosmetics Company, 'if any,'" should also go in.

The Court: Back home we always put that "if any" in there. All right, what's the next one?

Mr. Lanier: 15.

Mr. Bradish: I have serious objection to this. This presupposes lots of evidence that we haven't heard. We haven't had any evidence about any

hospital bills, past or future, and we haven't had any evidence of any expenses to be incurred in the future, and loss of income in the future, we've had no evidence whatsoever concerning that. [171]

Mr. Lanier: Counsel is not subject to evidence at any time where you have a minor.

Mr. Bradish: Well, I strongly disagree with you.

Mr. Lanier: You have testimony in here on the way the girl has been disfigured. That disfigurement can be taken, by way of inference, as to how it is going to effect her future income.

Mr. Bradish: You've got to have some testimony.

Mr. Lanier: You don't have to have a bit of testimony on a minor. She has no scale upon which to go.

Mr. Bradish: I have registered my objection, your Honor, for the record.

Mr. Packard: I join in the objection.

The Court: I'll give it as written.

Mr. Bradish: Including hospital bills? [172]

The Court: No. I'll take that hospital bills out of there.

Mr. Lanier: Taking the words "and hospital bills" out?

The Court: Yes.

Mr. Bradish: Are you going to give "future doctor bills"? It seems to me that it will be a little inconsistent with your theory that this is a permanent condition and no future medical attention will do anything to alleviate it, and then tell the jury——

Mr. Lanier: He may have a point there, your Honor.

The Court: Take out doctor bills. I'd leave it all out I believe.

Mr. Lanier: "you may take into consideration pain and suffering"—leave the whole doctor and hospital bills, past and future, out of it. Just scratch it out.

The Court: Okay, so amended. The next has to do with the form of the verdict.

Mr. Lanier: Which will be changed according to the form you actually [173] give them I presume, your Honor.

The Court: The forms of verdict were amended and they were presented. Did you see those?

Mr. Packard: Did the Clerk prepare those?

The Court: Yes. There's one form to find both guilty and one form to find neither guilty; one form to find one and the other one not guilty; one form to find the other one guilty——

Mr. Bradish: They look all right, Judge.

The Court: Let's turn to Mr. Packard's requests.

Mr. Bradish: We had one we were going to return to—No. 7.

Mr. Lanier: We couldn't find Bagi on that now. I think we better get 7 decided on.

The Court: The question raised was whether you have proven adequately, to be submitted to the jury, the matter of inherently dangerous drug. [174]

Mr. Packard: Yes, there's no proof that there should be warnings given of this particular drug. There isn't any evidence that, used in certain con-

centrations, that it's inherently dangerous. This is not a product that is inherently dangerous.

Mr. Lanier: Our position on that, your Honor, and the reason we want the instruction, is because of the fact that any time you have testimony of toxicity you have an inherently dangerous substance.

Mr. Packard: We gave instructions as to proper use and that's the point your Honor. It says, "That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for any purpose for which its use is expressly invited——"

Mr. Lanier: It's just like a weapon, your Honor. Properly used, it's not dangerous, but it still is an inherently dangerous weapon.

Mr. Packard: I submit that there is no evidence to show the product [175] was inherently dangerous and it would be error to give the instruction.

The Court: Maybe so. I'll give it. Now, we'll go to yours. On the whole, they look like a pretty good set of instructions. There's so many of them. Well, the first one I marked to give is No. 1, that Lewis is not an insurer or guarantor.

Mr. Bradish: I think that properly would apply to Rexall also. If you could change it to read that "the defendants"——

Mr. Lanier: No, I would resist that completely, your Honor, because the breach of warranty is not based upon negligence.

Mr. Bradish: This doesn't say anything about negligence.

Mr. Lanier: But it's a negligence instruction. You are talking about "insurer." When you give a guarantee you are an insurer.

Mr. Bradish: Let's get on the record then. Insofar as Instruction No. 1, requested by defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, I request [176] the Court to give the instruction to include therein the defendant Rexall Drug Company as a defendant who requested a similar instruction, and I request the Court to insert by interlineation the name "Rexall Drug Company" and change it to read "You are instructed that the defendants."

The Court: I want to raise a point there. I read that first sentence over a time or two, and it somehow doesn't quite ring—"You are instructed that the defendant—Arnold L. Lewis—you don't need to take what I say, except when I tell them I'll give the instruction, because I might change my mind.

(Off the record.)

Mr. Lanier: Just let the record show an exception to Defendant's No. 1.

Mr. Packard: I'll withdraw No. 1. I think I have some others.

The Court: All right, No. 2.

Mr. Packard: I'll withdraw this No. 2. Now 3.

Mr. Lanier: We have no objection to that. [177]

Mr. Bradish: I would like to have Rexall added to that. "By reason of any act or omission on the part of the defendant, Arnold L. Lewis, or any breach of warranty on the part of Rexall."

The Court: Any objection to that, Mr. Lanier?

Mr. Lanier: Now, how did you want to do that?

Mr. Bradish: "It will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis, or any breach of warranty on the part of Rexall."

Mr. Lanier: I have no objection to that.

The Court: No. 4.

Mr. Lanier: No. 4. I don't object to either, your Honor.

The Court: That goes to both?

Mr. Bradish: Yes, as worded, it does. [178]

The Court: All right.

Mr. Bradish: I think No. 5 if you just put the word "defendants" instead of "defendant."

Mr. Lanier: I have no objection to that instruction. The next one I do object to, your Honor, because there is not an iota of testimony in this record of any allergy.

Mr. Packard: I'm willing to strike out the words "or allergy" because I agree with counsel. I'm not going to claim there is an allergy.

The Court: I have it marked "not give" because it's a repeat. Now, then, No. 7. That goes for both defendants.

Mr. Lanier: That, of course, is completely out of res ipsa loquitur. You are getting entirely away from res ipsa.

Mr. Bradish: Since the theory of this case is, on the part of the defendants, that the doctrine of res ipsa loquitur is not applicable, I think in order to support the [179] defense theory, that this in-

struction should be requested. Now, if your Honor wants to refuse it, that's another thing. We feel of course the doctrine of res ipsa loquitur is not applicable here. And if it is not applicable then this instruction is proper.

Mr. Packard: I may state, your Honor, that it is error to give this instruction if the doctrine of res ipsa loquitur is applicable, but I feel that the doctrine is not applicable, so therefore insisting on the instruction.

(Off the record.)

The Court: I won't give it, in view of what you've said here.

Mr. Packard: Do we have to except to the fact you don't give them, or are they deemed excepted?

The Court: You will have to make your exceptions at the end if you want some instructions given that I haven't given, and——

Mr. Packard: Why can't we stipulate if we make our objections in chambers here, they may be deemed—I think it will save a lot of time. [180]

The Court: It takes away from the Court all flexibility of thinking between now and the time the instructions are given. All right, let's go on to No. 8.

Mr. Packard: No. 8, I'll withdraw.

The Court: No. 9.

(Off the record.)

Mr. Packard: I think No. 10 covers probably the same thing. I want one or the other, but I think—I'll withdraw 9 if the Court gives 10.

Mr. Lanier: If No. 9 is withdrawn, I do not think I will have any objection to 10.

Mr. Packard: All right, I'll do that, and I will further stipulate, your Honor, that wherein you give the instructions on behalf of both defendants, you may strike "Arnold L. Lewis, doing business, etc." I think if you just put "defendants," I think it will be much easier to instruct that way. [181]

Mr. Bradish: For both defendants.

The Court: No. 10 given as amended. Now No. 11. That's good for both, isn't it?

Mr. Lanier: We have no objection to that instruction, your Honor.

The Court: All right, 12?

Mr. Packard: I'll withdraw this. The Court has, as I understand, ordered a dismissal to the second cause of action as against Lewis, so I will withdraw this.

The Court: All right. 12 withdrawn.

Mr. Packard: 13 I'll withdraw; withdraw 14; 15 withdrawn; 16 withdrawn. I think 17 is a correct statement.

Mr. Lanier: I have no objection to 17.

The Court: 17 given. 18.

Mr. Lanier: It's repetitious, your Honor. [182] I have no objection to the instruction itself. It goes back to the last one before that, I think one or the other of them should be withdrawn.

Mr. Bradish: This goes to the contributory negligence. The other one goes to the burden of proof.

Mr. Lanier: I think you might be right, counsel; it's somewhat repetitious, but we have no objection to it.

The Court: Give them both. The next one is 19. I have "not give" for some reason.

Mr. Packard: I'll withdraw 19; withdraw 20 and I'll withdraw 21.

Mr. Bradish: Wait a minute. I certainly would want that to be given. I discussed this with your Honor a few days ago and asked——

Mr. Lanier: I think it's a proper instruction, your Honor.

The Court: I think it is too. I have it marked "give."

Mr. Packard: Let the record show it has been withdrawn on behalf of Lewis. [183]

Mr. Bradish: And I have requested it on behalf of Rexall.

(Off the record.)

Mr. Packard: I'll withdraw 22.

Mr. Bradish: I think it should be given because it explains Section 1732, parts of it.

The Court: You have some instructions there, we'll get to them.

Mr. Bradish: If you change the words "made to her by the defendant, Rexall Drug Company, were merely affirmations as to the value of the cold wave solution or expressions of his opinion of the cold wave."

The Court: Denied. 23?

Mr. Packard: I'll withdraw 23.

Mr. Lanier: No objection to 24; 25 I have no objection to; 26 no objection; 27 no objection; 28 no objection; 29—— [184]

The Court: Wait a minute. You're going too fast.

Mr. Lanier: Let's go back to 24 then and let's see where we are.

The Court: 24 was given. 25 was given; 26 given; 27 given; 28 given.

Mr. Lanier: 29 no objection; 30 we have no objection to.

Mr. Bradish: Are these all going to be given, your Honor?

The Court: Well I've got to study them a little bit. I haven't had time to figure out what is necessary and what is not. I don't see any fault in them, I'll say that, and it might be Mr. Packard that if you will go through those, you might indicate to me what ones you want to be given.

Mr. Packard: These are all just standard.

Mr. Lanier: 31 I have no objection to.

Mr. Bradish: I think they ought to be given unless counsel has [185] some specific objection to any one of them.

Mr. Lanier: 32 I have no objection to. 33 I have no objection to; 34 I have no objection to; 35 I have no objection to. 36 I have only this objection, your Honor. I think the words should be written in there "his or"—his or her testimony, and the same thing in the next to the last line should be "of truth favors his or her testimony." The same thing is true in the last line of 37. It should be "by him or her" on that point.

The Court: I don't see anything to be gained by giving 37.

Mr. Packard: I certainly want 37.

Mr. Lanier: Yes, I want that one too, your Honor.

The Court: Okay.

Mr. Bradish: Again, I'm right in the middle.

Mr. Lanier: Of course I certainly want 38 too. I think it's necessary in this case. [186]

Mr. Packard: I'll withdraw 39. When you prepare the instructions you never know what the testimony is going to be.

Mr. Lanier: And 39 is withdrawn, right?

Mr. Bradish: 40 is expert testimony.

Mr. Lanier: It's already been requested and given in mine. I think if you just withdraw it, it will save a lot of trouble for the Court.

Mr. Packard: I'll withdraw 40.

The Court: What about 41?

Mr. Lanier: As a matter of fact, there isn't a hypothetical question in this case, your Honor.

Mr. Packard: Oh, yes, I asked this guy, "assume there was a solution; that thioglycolate was in the normal limits and assume there was no skin irritation" — I asked Jeffreys that — assume that — I asked him that question.

The Court: Well that's good law anyway. [187] I think I'll give it.

Mr. Lanier: Yes, it's good law. I have no question about that; there isn't any doubt about that.

The Court: Now the next one, 42. I thought it was a little complicated.

Mr. Packard: The only thing I'm thinking, your Honor. I would like to have this given from the standpoint that there's certain history given she

had a cold wave solution. And that's hearsay insofar as the doctor is concerned.

The Court: It doesn't make any difference because it's true, isn't it?

Mr. Lanier: But you see that's not the purpose of this instruction with your medical. The purpose of this is where a witness comes into a doctor and she says "Oh, doctor, I——"

Mr. Packard: I'll withdraw it.

Mr. Lanier: I have no objection to the next one, but I don't see much value to it. [188]

Mr. Bradish: 43?

Mr. Lanier: 43, yes. I have no objection to it. I think that 44 is out under the other instructions. That's just going to confuse the jury because you definitely told them you can only hold one defendant under one and the other one under the other.

Mr. Bradish: I don't think so. This instruction tells them that each defendant is entitled to a fair consideration of his own defense.

The Court: I'll give 44. Now what about the definition of "negligence"? I think if you give 45 and leave 46 off, you can give the shortest one and it will probably be just as effective.

Mr. Bradish: I think that's all right. With me, it is because I'm not involved in negligence.

Mr. Lanier: Now which is which?

The Court: 46 is the second one on negligence.

Mr. Packard: I'll withdraw it. [189]

Mr. Lanier: Is 45 being given, your Honor?

The Court: Yes.

Mr. Packard: 47 I'm insisting upon. It's a correct statement of law.

(Off the record.)

Mr. Packard: I insist this is a correct statement of the law. I think this is a proper instruction, your Honor.

The Court: I think I'll give it, Mr. Lanier. 48 now. Gentlemen, I have a feeling—right now it's eleven o'clock, that if the jury were permitted to go and come back at one-thirty, then there wouldn't be any interference with your arguments.

Mr. Lanier: Would one be too early for them?

The Court: I want to get through here. We've got to go over Mr. Bradish's instructions yet. [190]

Mr. Lanier: Certainly we're not going to get any argument started this morning.

The Court: No, I don't see how we can. (Addressing the Clerk:) Suppose you have them brought in and I'll make that announcement from the bench.

(Whereupon, the Court, reporter and clerk proceeded to the courtroom, where the following proceedings were had:)

The Court: I assume the members of the jury think there is a lot of idleness going on about this case, but it isn't true. We have been working awful hard in there. There's a good deal of work to be done in getting a case ready to be presented to the jury after the evidence is all in, and we aren't through yet. I brought you in so you could have an opportunity to separate until one-thirty, and we are hopeful by that time not only to have our problems ironed out, but to get our lunch too and be back

here at one-thirty and hear the arguments in the case at that time, so if you will withdraw at this time under the same injunction heretofore given, not to talk to [191] anybody about the case or let anybody talk to you about the case, or not to try to determine in your own mind what the outcome should be until you have heard the arguments of counsel and the instructions of the Court. You may go now and come back at one-thirty. The bailiff may take the jury.

(Whereupon, the Court, reporter and clerk returned to Chambers, for resumption of instructions discussion.)

The Court: All right. 48 given as amended. 49.

Mr. Lanier: 49 is objected to, your Honor, on the grounds I've already given, that ordinary care is not the care incumbent upon the manufacturer of the product and unless it's compared to people in like field, like products, but here again, this is repetitious.

The Court: We have one like that.

Mr. Packard: No, this your Honor is just a definition, that's all, of ordinary care, isn't it?

The Court: Isn't the other one? [192]

Mr. Packard: Which other one?

The Court: There's an earlier one.

Mr. Packard: There is one on negligence. I have never tried a case that this instruction hasn't been given, except a common carrier.

Mr. Bradish: It seems to me that this instruction favors your side of the case in that it applies to contributory negligence as well as negligence.

Mr. Packard: Are you going to give 49?

The Court: Yes.

Mr. Packard: Withdraw 50.

Mr. Bradish: 51 is just a——

The Court: Definition of contributory negligence. I've got it marked to give. [193]

Mr. Lanier: Now, there is only one objection that I have to that as given, your Honor, without anything further, and that is that along with that instruction, which I think is proper, should be given the fact that the burden of proof, proving that contributory negligence is on the defendant. Now if there is another instruction here on that.

Mr. Packard: As a matter of fact, there are two instructions I ordinarily always submit, but have not been submitted because when I prepared these instructions I didn't know how I was going to prepare in that I had negligence and warranty tied in, and that was 113 and 116 of Bagi on burden of proof.

The Court: Is the rule of evidence in North Dakota that contributory negligence must be proved by the person seeking it? Is it part of the case for the plaintiff or part of the case for the defendant.

Mr. Lanier: Part of the case of the defendant. He has the burden of proving it, according to the evidence.

(Off the record.) [194]

Mr. Lanier: If this instruction is to be given, this instruction standing alone is not proper unless the additional sentence is added to it that the burden of proof——

The Court: Let me ask you directly, and before we go on, where is the burden of proof on contributory negligence?

Mr. Bradish: In North Dakota, I don't know. In California, the defendant has the burden of proving by a preponderance of the evidence that the plaintiff was guilty of contributory negligence.

Mr. Lanier: The same in North Dakota.

The Court: You pleaded contributory negligence.

Mr. Bradish: Contributory negligence has been pleaded but this instruction is perfectly correct law. Now, if counsel wants the jury instructed that the burden of proving is on the defendant he should have requested such an instruction because contributory negligence is set up in the answer, and that's one of the issues. [195]

Mr. Packard: This is covered in Bagi 21 and it says—"In Civil Action, the party who asserts the affirmative of an issue must carry the burden of proving it." In other words, the burden of proof as to that issue is on that party. Then it goes on to say "Your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue." Now, we're asserting the affirmative of contributory negligence, so I think Bagi No. 21 covers the burden of proof.

Mr. Lanier: Not to a jury, it doesn't cover it.

Mr. Packard: We can argue it. This doesn't have to do with burden of proof, this instruction. It's just a statement of the law of contributory negligence.

Mr. Lanier: If it's going to be given, then it

should be given at the same time also stating that the burden of proving the defense of contributory negligence——

The Court: If you want that instruction, Mr. Lanier, you might submit it. I don't mind if you submit it in longhand as far as I'm concerned. [196]

Mr. Lanier: All right, your Honor, I shall do.

The Court: 52. That's a definition of "proximate cause"; it seems all right to me.

Mr. Lanier: No objection.

Mr. Bradish: Now this Instruction No. 53, again goes to an inconsistency between this instruction and the doctrine of res ipsa loquitur, and if your Honor feels that res ipsa loquitur applies here, you should refuse this instruction because it would be error to give it.

The Court: I'll refuse it.

Mr. Bradish: 54 I think is good law.

Mr. Lanier: I have no objection to 54.

The Court: Given.

Mr. Bradish: 55. [197]

Mr. Lanier: 55 I think should be given.

The Court: Now, then.

Mr. Lanier: I have no objection to 56.

The Court: 57—let's take a look at the last two lines.

(Off the record.)

The Court: 57 given. Now 58.

Mr. Lanier: Of course, I object to that one, your Honor, because there's no testimony here of pre-existing injury.

(Off the record.)

Mr. Packard: I'll withdraw 58.

Mr. Bradish: 59, the last one.

Mr. Lanier: Well, now that last instruction, your Honor, I have no objection to except that if that instruction is going to be given, it should be given both ways. "I, of course, do not know whether you will need the instructions [198] on damages, and the fact that they have been given to you must not be considered as intimating any views of my own," and I would like an insertion in that, your Honor, if it is going to be given, "one way or the other" on the issue of liability or as to which party is entitled to your verdict.

Mr. Bradish: Well, it seems to me the Court will take judicial notice.

The Court: What are you going to with that "I, of course, do not know whether you will need the instructions," do you want that in there?

(Off the record.)

The Court: 59 given as amended.

We have on the tail end of this thing some instructions requested by Mr. Bradish.

Mr. Bradish: Your Honor, my instructions as presented were not numbered.

The Court: I've numbered them. I didn't know how else to get at it so I could make a note of what I thought about them. [199]

Mr. Bradish: All right. You started with 1, did you?

The Court: Yes.

Mr. Bradish: All right. Your last one here is

No. 20. So those two that I presented this morning, will you make those 21 and 22?

The Court: Yes, what became of those?

Mr. Bradish: I gave them to the clerk. Make those 21 and 22.

(Off the record.)

Mr. Bradish: I'll withdraw No. 1, your Honor.

Mr. Lanier: Of course that No. 2 we object to.

Mr. Bradish: I certainly don't know why.

Mr. Lanier: Because they gave an express warranty, they are an insurer.

Mr. Packard: I withdraw my No. 1, your Honor.

Mr. Bradish: They are not an insurer. By giving an express warranty, you don't insure the safety of the public in using a product. An express warranty is to the value of it and to induce them to buy it. You certainly aren't an insurer of the safety of the public by making a warranty unless the express warranty absolutely states that you are insuring their safety in the use of this——

Mr. Lanier: We don't have to show any negligence. All we got to show is that's what caused it. Negligence becomes moot entirely.

Mr. Packard: Your Honor, I never did get my instruction that we're not an insurer in here. I withdrew that No. 1——

The Court: I thought you said it was covered somewhere else.

Mr. Packard: I thought it was, but it wasn't.

The Court: Well, you are entitled to it. [204]

Mr. Packard: And I feel like No. 1, we can go back—I hate to do this—to my No. 1, which is the

same as his No. 2, and I withdrew it, and I am going to ask to be relieved of my stipulation to withdraw it and I am going to still request my No. 1, which reads:

"You are instructed that the defendant, Arnold L. Lewis doing business as Studio Cosmetics Company, is not an insurer or guarantor of plaintiff's safety." I changed "condition" to "safety." "The duty of care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances." I think that's a proper instruction.

The Court: I think so.

Mr. Packard: May the record show that my No. 1 will be given?

The Court: Yes. Now, then, your No. 2, Mr. Bradish.

Mr. Bradish: It's the same thing except that it's greatly minimized.

The Court: I'll give it. Now then I will deny 3.

Mr. Lanier: Now, that, I have given as "no," your Honor, because of the phrase in there "however slight," which implies the tiniest little eenie bit——

Mr. Bradish: Contributory negligence is negligent in any degree.

Mr. Lanier: "In any degree" I have no objection to. The wording "however slight" has been held error in my State.

Mr. Bradish: Do you want to change "however slight" to "in any degree"?

Mr. Lanier: "In any degree" I have no objection to because that is the wording.

Mr. Bradish: We can argue "however slight," because if it's any degree it might be one degree.

Mr. Lanier: I think you can argue it.

Mr. Bradish: You better change this one though because I'm not interested in negligence anymore.

Mr. Lanier: I don't think this applies, of [203] course, to this defendant at all.

The Court: That's the reason I had it marked "not give."

Mr. Lanier: Is that withdrawn?

Mr. Bradish: No, he just refused it. (4)

The Court: 5 will be refused to. 6 will be given.

Mr. Lanier: I have no objection to 6.

The Court: 7 not give that. That has to do with negligence. 8 not give. Now, then No. 9.

(Off the record.)

The Court: I will refuse 9.

Mr. Lanier: That, of course, again, your Honor, just isn't the law. It's their product——

Mr. Bradish: It is not our product. [204]

Mr. Lanier: It certainly is. You have the franchise for this product. It's made exclusively for you. It's sold through your chain; you're responsible for it. It's incorporated in your advertising. It's incorporated in your guarantee——

Mr. Bradish: It is not a Rexall product and you certainly can't be sincere if you state that we're responsible for the product, outside of a breach of any express warranty.

Mr. Lanier: And when you put your guarantee

with it and you advertise it as a Rexall product, which it is, and which the testimony shows, then of course you're responsible for your own guarantee —and your own warranties.

Mr. Bradish: We're responsible for breach of any warranty that we make concerning it within the definition of warranty and we're responsible for our guarantees to the extent of the guarantee. A guarantee is a contract. This is the correct law. If you——

The Court: I will refuse 9. Now 10. [205]

Mr. Lanier: Of course, I think that applies to negligence.

Mr. Bradish: No, it does not apply to negligence. It applies to representations made in connection with the sale of goods, and what representations the druggist made or what representations are made in the directions furnished by the manufacturer, are not the representations of Rexall.

Mr. Lanier: Your own exhibit in evidence, counsel, shows the relationship with the drug store, the fact that they have to buy your product, the fact that they have to sell so much of it and so forth.

Mr. Bradish: That doesn't say they can't sell other products.

Mr. Lanier: No.

Mr. Bradish: Would you say that a representation made by the druggist of something that wasn't Rexall products would—the man would still be an agent of Rexall?

Mr. Lanier: No, I would not, but when Rexall

itself makes an [206] express warranty this instruction is completely contrary to law.

Mr. Bradish: This doesn't say Rexall's express warranty, this says, "any representation made by Studio Cosmetics."

Mr. Lanier: When you put your guarantee within that package, counsel, and put it out——

Mr. Bradish: We didn't put it in the package.

The Court: I'll deny Instruction 10. 11 refused. 12 is negligence; 13 is negligence, 14 is negligence, 15 is negligence——

Mr. Bradish: 15 isn't necessarily negligence. 15 I think could go to warranty or any affirmation made concerning its condition.

Mr. Lanier: It's truly a negligence instruction. It doesn't apply to warranty.

The Court: I won't give 15. [207]

What about 16, Mr. Lanier?

Mr. Bradish: I don't think even Mr. Lanier will find any fault with that.

Mr. Lanier: I have no objection to that, your Honor.

The Court: 16 I'll give. 17 is out; 18 is out; 19 is out; 20 is out.

Mr. Bradish: Now, the only other two are those that you don't have copies of but they are the two sections of the Uniform Sales Act. One defines express warranty and the other deals with the giving of notice within a reasonable time.

The Court: Didn't I understand that Mr. Lanier examined them and Mr. Rourke, and they didn't object.

Mr. Lanier: Yes, that's 21 and 22. The only thing that I do object to, your Honor, is the fact that they quote the Civil Code of the State of California. We do not have with us the same applicable code of North Dakota, and it seems like to me in order to avoid any error that in [208] quoted the law of California, the substantive law in this case to me is in itself error.

The Court: I thought both sides had assured me that the statutes are similar.

Mr. Lanier: They are and I would be taking no exceptions, your Honor, but because of this, and I don't see why we should confuse this record by stating that Section 1732——

Mr. Bradish: All right, let's just put down there——

Mr. Lanier: "The law of North Dakota applicable to this case provides as follows:" I think that that is the way that it should be.

Mr. Packard: "The law applicable in this case"—don't say North Dakota—just say "the law applicable to this case provides as follows:"

The Court: I think probably you are right about that.

Mr. Bradish: Now, after your Honor instructs the jury, then we will [209] have a session with your Honor before the jury goes out to make our formal objections or exceptions——

The Court: Out of the presence of the jury.

Mr. Bradish: Yes. Thank you.

Mr. Lanier: Let the record show that plaintiff's counsel has permission of the Court to make his

instruction request No. 17 in longhand on scratch paper——

The Court: I don't care if it's scratch paper or some other kind.

Mr. Bradish: To which we have no objection and we will waive any right we have to receive a copy of it.

The Court: "You are instructed that the defense of contributory negligence is pled by the defendants. The burden of proof to show contributory negligence is on the defendants to prove contributory negligence by a preponderance of the evidence." Instruction No. 17.

Mr. Packard: I don't have any objection. [210]

(Whereupon, a recess was taken until one-thirty o'clock p.m.)

Afternoon Session

(Whereupon, at the hour of one-thirty o'clock p.m., the hearing was resumed, pursuant to adjournment, and the following further proceedings were had in chambers:)

Mr. Bradish: For the record, on behalf of the defendant, Rexall Drug Company, in view of the dismissal of Count 1, which sounds in negligence as to defendant, Rexall Drug Company, and the further dismissal of any claim of implied warranty, on behalf of the defendant, Rexall Drug Company, I would move at this time for the court to strike the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson, which were read into evidence over objection made at that time to the jury. This motion

is made on the ground that nothing contained in the depositions of Mrs. Donald Carlson or Mrs. Carl Carlson would be in any way material to establish any express warranty, made on behalf of Owl Rexall to the plaintiff in this action, or there would be nothing material in those depositions to [211] establish any breach of any express warranty made by defendant Rexall Drug Company to the issues in this case.

Mr. Packard: And may the record show that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, joins in the motion on the basis that the only issue now existing as against said defendant is on negligence, and that these depositions are certainly not admissible to show that there was any negligence on the part of the defendant in the compounding, mixing or making of said solution.

Mr. Lanier: May the record show that both motions are resisted on the grounds, first, that they are not timely. Second, upon the grounds that the two depositions both go to the question of proximate cause as to both defendants and the question of negligence as to the defendant Studio Cosmetics.

The Court: Motion denied.

Mr. Packard: I submit I do not agree they are material as to [212] negligence to show that somebody else at a later date used some product and had some trouble with it therefore the manufacturer was negligent in the mixing of the solution. It may well be that the jury will be confused as to the purpose for which this is admitted. We object to it being admitted upon any grounds and we

have heretofore noted our objections, and we are going to stand on the record insofar as the objections heretofore made, and we incorporate them at this time for further consideration of the Court.

(Whereupon, the Court, counsel for the respective parties, the reporter and the clerk proceeded to the courtroom, and the following proceedings were had in open court:)

The Court: Ladies and gentlemen of the jury, we finally got things worked out now, so the lawyers may go to you with their arguments in the case and after the arguments have been concluded the Court will have the responsibility of instructing you with reference to the law. The plaintiff may open the arguments. [213]

(Whereupon, counsel delivered their summations to the jury and, thereafter, occurred the following proceedings:)

The Court: Ladies and gentlemen of the jury, another day, according to the usual hour, has come to an end and I'll not ask you to listen to the instructions tonight, but I'll let you go until—I think I'll make it ten o'clock in the morning, but do please be here, all of you, at ten, so we can begin giving the instructions immediately and then you will go to your jury room to proceed with your part of the case. You've heard everything now that you're entitled to hear until you get the instructions of course, so keep your minds clear of any outside suggestions from any source at all until you've heard the instructions of the Court and have been segregated just among yourselves to consider the

evidence which has been produced here in this case. The bailiff may take the jury.

(Whereupon, at four-thirty p.m. April 15, 1958, the hearing was adjourned until 10 o'clock a.m. April 16, 1958.) [214]

Be It Remembered, that a further hearing was had in the above-entitled and numbered cause, on its merits, before the Honorable Fred L. Wham, Judge presiding, and a Jury, in the Federal Court Room, Federal Building in the City of Los Angeles, State of California, on April 16, 1958, beginning at the hour of 10:00 o'clock a.m.

There were present, at said time and place, the appearances as heretofore noted.

Whereupon, the following proceedings were had in open Court:

The Court: Ladies and gentlemen of the Jury. [215] Our long, perhaps at times wearying session together, has about come to an end. Very soon now the lawyers' work and my work will be over, largely, and you will carry the burden of the case. I want to thank you most sincerely for your patient attention to the evidence in the case and also your diligence in attending upon the sessions of the Court. It is not easy always, and I always do appreciate a jury which shows the tendency which you have shown to be serious about your duties and obligations. The duties of a Court and Jury respectively are quite distinct from each other. You have the duty of deciding what the facts are

in this case from the evidence, but under the instructions given to you by the Court. The Court has the duty of giving you those instructions in a way, if possible, that you can understand, and apply the instructions in considering the evidence and in determining your verdict in a just and fair manner.

It becomes my duty now as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and [216] weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [217]

The Court will endeavor to give you instructions embodying all the rules of law that may become necessary in guiding you to a just and lawful verdict. I might interpolate there, that if the instructions seem rather long—lengthy—take sometime to deliver to you, it will be for that very reason that I have endeavored to cover all the principles which are applicable here that you should be advised about. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state

of facts which you find does not exist under the evidence, you will disregard the instruction. [218]

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance. I made an endeavor as best I could, in the limited time I had, to organize the instructions so they will be somewhat in logical order, but it's not my purpose to emphasize any particular principle above others. [219]

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witnesses. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the

reason for the objection; nor may you draw any inference from the question itself. [220]

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to the action.

And I might emphasize again what the lawyers said to you so wisely yesterday, you shouldn't hold any prejudice that any lawyer may have incurred. I don't think it happened here because I thought the case was tried in a very gentlemanly way, but it is not the lawyers who are in this litigation, it's the client, and you mustn't hold anything a lawyer may have said or done or failed to say and do, that you thought he should have, against his client. [221]

It is your duty as jurors when you come to consider your verdict to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [222]

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. [223]

Upon retiring to the jury room you will select one of your number to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. As soon as twelve of you will have agreed upon a verdict, you shall have it signed and dated by your foreman and then shall return with it to this room. [224]

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evi-

dence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue. [225]

This is a civil action, Ladies and Gentlemen of the Jury, brought by Sandra Mae Nihill, a minor, of the State of North Dakota, by and through her father and regular guardian, John Nihill, also of the State of North Dakota. That this action, brought against two defendants, the Rexall Drug Company, a corporation, and Arnold L. Lewis, an individual, doing business as Studio Cosmetics Company.

This action is brought under two separate causes of action. Number One sounding in negligence and Number Two sounding in breach of warranty.

I pause there to emphasize again what I told you yesterday, or day before, that the way the case has developed the plaintiff is not insisting on a judgment on the first count against the Rexall Drug Company, only against Lewis, doing business under the name of Studio Cosmetics Company. And as to the Second Count, Count Two, there is no

request for you to find a judgment against Lewis, or the Studio Cosmetic Company, but only as against Rexall. That Count is based on a charge of violation of a warranty, and Lewis isn't charged with that, but only the Rexall people are charged with that. So when you consider Count One, you will consider it only [226] as to Lewis, or the Studio Cosmetics Company. When you consider Count Two—Count One being based on negligence—When you consider Count Two, which is based on a charge of warranty, then you will consider that only as to the Rexall Drug Company.

Under the negligence cause of action, the plaintiff, in her pleadings, alleges that the defendant Rexall Drug Company, was the distributor of Cara Nome products, and that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, was the manufacturer of said product. She also alleges that on the fifth of February, 1955, plaintiff purchased—plaintiff here being of course Sandra Mae Nihill—from the Kensal Drug Company of Kensal, North Dakota, a bottle of said product of Cara Nome, which was sealed; she also alleges that this product was immediately taken to the home of the plaintiff, and opened and used pursuant to directions accompanying said product; that within ten days after said use plaintiff's hair began coming out and continued to do so until it was all gone; that ever since she has been bald [227] and will always be so disfigured; that said product and the application thereof was the direct proximate cause of the loss of her hair; that the defendant, Studio Cos-

metics Company, was guilty of negligence in permitting some ingredient to be placed in said bottle that could result in the loss of hair as aforesaid, or guilty of some negligence in the mixture of said ingredients in said bottle and was negligent in advertising and selling to the public and particularly to the plaintiff, said product with its unsafe and dangerous ingredients. Of course it isn't the charge here that the Cosmetic people actually made the sale, but the charge is that the cosmetic people were negligent in the manner in which the product was made up and bottled in the mixture contained in the package.

On Cause Number Two, plaintiff alleges that said product was advertised and sold as a safe product suited to be used for the purposes for which it was used, that it was represented by defendants to be non-injurious to the hair and safe for the purposes for which it was sold and purchased; that plaintiff relied upon said representations and upon the strength of said representations, used said product as aforesaid and suffered the [228] ill effects aforesaid; that the plaintiff gave reasonable notice to the defendants after the discovery of the ill effects aforesaid.

Plaintiff further alleges that as a result of the use and application of said product, plaintiff has been disfigured for life, made bald, and subjected to humiliation and embarrassed and caused mental anguish and will continue to suffer from baldness, humiliation, embarrassment, mental anguish and all the natural attendant incapacities socially and eco-

nomically; that she has incurred expenses of medical clinics, doctors, medicines and other treatments in the endeavor to be cured and to be restored to the status of a girl with hair.

Because of all of which plaintiff demands judgment at your hands in the sum of $250,000.

And it was explained to you yesterday by counsel, the $250,000, the law requires that some sum be put in there as a maximum beyond which the jury can not go lawfully. It does not mean that you are in any sense bound, or should be influenced by the amount which is demanded, but you should fix your verdict entirely upon the evidence and your damages, if any you should allow, [229] upon the evidence, or that has been suffered by this girl.

Now as to that complaint which I have read to you, or refused before you, the defendants each has filed its own answer denying that any negligence under Cause of Action No. 1, and denying cause of Action No. 2 and affirmatively allege that the injuries and loss, if any, sustained by the plaintiff herein, were proximately caused and contributed to by the negligence on the part of the plaintiff in that she did not exercise ordinary care on her own behalf; that whatever injury or damage, if any, was suffered by the plaintiff, the same was a direct and proximate and sole result of plaintiff's physical and bodily condition and constitutional composition on, prior and subsequent to all times mentioned in plaintiff's complaint; that the plaintiff failed to give notice to the defendant within a reasonable time of this breach.

The defendants, Rexall Drug Company and Arnold L. Lewis, doing business as Studio Cosmetics Company, pray that plaintiff take nothing by reason of her complaint. That makes up the issues that you are to try, the complaint and the answers to the complaint. One side asserting, the other side denying, and insofar as defendants [230] do charge that any ill results that may have been caused by the solution, if any, they charge that it was due to the contributory negligence of the plaintiff herself. Now as to that charge of contributory negligence, the burden of proof is upon the defendants because you see they affirmatively assert that as a defense, so the burden there is upon them to prove that particular defense by a preponderance of the evidence.

You are instructed further that the rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the issue. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound. [232]

In this case there has been a conflict in the testimony of expert witnesses concerning the cause of

the loss of hair by the plaintiff and whether or not that loss of hair is permanent. You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, and the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testimony which, in your opinion, is entitled to the greater weight. [233]

In examining an expert witness, such as a physician and surgeon, counsel may propound to him a type of question known as a hypothetical question. By such a question, the witness is asked to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the Court does not rule, and does not necessarily find even in its own mind, that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you, the Jury, to find from all the evidence whether or not the facts assumed in a hypothetical question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

Failure to prove a fact assumed in a hypothetical question may make the opinion based on it entirely worthless, or the opinion may, nevertheless, have weight and value, depending on the relationship of such an assumed fact to the issues of the case, the

facts proved [234] and the expert opinion. In respect to such a matter, you will apply your own reasoning to the end of drawing a conclusion that will be just and sound. [235]

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You must never assume or speculate to be true any insinuation carried or suggested by a question put to a witness by examining counsel or by the court. The examiner's question is not evidence except only as it explains or throws light upon the answer.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [236]

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely

from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. The Court will inform you of any presumption that may become applicable in this case. [237]

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a balance of probability exists pointing to the accuracy and honesty of the one witness. [238]

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that shows or pertains to the character of the witness for truth or integrity, or that pertains to his motives, or by

proof that he has been convicted of a felony. There was no such proof as that in this case, and therefore that matter of conviction need not be considered here. [239]

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe that the probability of truth favors her testimony in other particulars. [240]

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which lies within the power of one side to produce and of another to contradict.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by her or him on that point. [241]

In the present action certain testimony has been read to you by way of deposition.

You are instructed that you are not to discount this testimony for the sole reason that it has come to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you from the witness stand. [242]

Now I have explained to you about the position

of the parties with reference to the complaint at this time. I now give you some further instructions along that particular line.

You are further instructed that under the proof in this case the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, cannot be held liable for breach of warranty and you cannot hold him liable under Count Number Two of this action.

To hold the defendant, Studio Cosmetics Company, liable on Count One — that's the count that charges negligence—you must first find that defendant guilty of negligence as negligence is hereinafter defined and that the plaintiff, Sandra Mae Nihill, is free of any contributory negligence. If you so find from the evidence, then you should bring in a verdict under Count One, for the plaintiff and against the defendant, Studio Cosmetics Company.

Added to that instruction, I think should be the further instruction that even though negligence be proved, unless you find it to be the proximate cause of the damage to Sandra Mae Nihill, then the fact that there was negligence can not be of any moment in this case, but [243] you must find first there was negligence, and, secondly, that negligence proximately caused the injury which the plaintiff complained of here. Then you must further find that she, herself, was free of contributory negligence.

It is your duty to consider and make up your verdict from all the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res

ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in cases similar to this.

That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a proximate result of the application of the Cara Nome Pin Curl Wave, and, if you should believe, from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same, as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this: [244]

That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due

care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application [245] were followed substantially by the one using it, and that the one using such product was injured as a result of using it, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof. [246]

You are instructed that the defense of contributory negligence is pled by the defendants. The burden of proof to show contributory negligence on the part of the plaintiff, is on the defendant to prove such contributory negligence by a preponderance of the evidence before the jury can find contributory negligence. [247]

You are instructed that the manufacturer of a product that is either inherently dangerous, or reasonably certain to be dangerous if negligently made, owes a duty to the public generally and to each member thereof who will become a purchaser or user of the product. That duty is to exercise ordinary care to the end that the product may be safely used for the purpose for which it was intended and for

any purpose for which its use is expressly invited by the manufacturer. Failure to fulfill that duty is negligence. [248]

You are instructed that this action is brought under two specific counts, one for negligence and the other for breach of warranty.

You are further instructed that the defendant, Rexall Drug Company, has no duty to inspect and cannot be held liable in this case because of mere negligence and hence under Count One of the complaint, you cannot hold the defendant, Rexall Drug Company, liable.

To hold the defendant, Rexall Drug Company, liable under Count Two, you must find that the defendant, Rexall Drug Company, in its advertising, or in the guaranties in said advertising, if any, or in any written guarantees delivered to the purchasers with the product, if you find such guarantees were delivered with the product, has made representation as to quality and merits of its products aimed directly at the ultimate consumer and urges the consumer to purchase the product from a retailer, and such consumer does so purchase in reliance on and pursuant to the inducements of the defendant, Rexall Drug Company, and thereby suffers damages as a proximate result of the use of said product.

If you so find, and if you further find that the plaintiff was free of negligence in the application of this product, then you shall find for the plaintiff as against the defendant, Rexall Drug Company. [249]

You are instructed that evidence may be either direct or indirect. Direct evidence is that which

proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence, known as circumstantial evidence, is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence, or circumstantial evidence, is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be found on a fact or facts proved, and be such a deduction from those facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. [250]

Another name for indirect evidence is circumstantial evidence. Both direct evidence and circumstantial are recognized and admitted in courts of justice, and upon either or both juries lawfully may base their findings.

The law makes no distinction between the two classes as to the degree of proof required, but respects each for such convincing force as it may

carry and accepts each as a reasonable method of proof.

Negligence and proximate cause may be proved by indirect evidence, if it carries the convincing force needed to constitute a preponderance of the evidence. [251]

You are instructed that the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, is not the insurer or guarantor of plaintiff's safety. The duty and care imposed upon the defendant is not absolute, such as the liability of an insurer would be, but it is only his duty to use ordinary care under the circumstances. [252]

If the evidence in this case indicates that the condition of the plaintiff, Sandra Mae Nihill, may have been the result of some act or omission on her part, or may have been the result of natural causes beyond the control of the defendant, it will be your duty to find that the condition was not caused by reason of any act or omission on the part of the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company.

I assume the same instruction would apply to Rexall Drug Company, Mr. Bradish, and the jury are so instructed. [253]

In deliberating upon this case, you must bear in mind that not every accident gives rise to a cause of action upon which the party injured may recover damages from some one. Accidents occur every day, for which no one is to blame, not even the one who is injured. [254]

If you believe from all the evidence that the dam-

age to the plaintiff, Sandra Mae Nihill, was due to some prior condition not discoverable by the defendant in the exercise of ordinary care, then I instruct you that the plaintiff herein cannot recover for any damage which she may have received as the result of the application of the solution in question.

You are instructed that in the event you can not determine from the evidence whether the plaintiff, Sandra Mae Nihill's injuries are the result of any one of a number of different possibilities, then I instruct you that you must find for the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, and against plaintiff.

Then under that same state of findings you would also have to find in favor of the Rexall Drug Company. [256]

Where a product is delivered or sold to a person for use and instructions for the use of the product go with it, it is incumbent upon the plaintiff to prove by a preponderance of the evidence that such instructions were followed. The burden is upon the plaintiff. The evidence of compliance with the directions must be shown to you by competent testimony. If in the instant case the plaintiff, Sandra Mae Nihill, has failed to show by any evidence which preponderates that she followed the directions given for the use of the cold wave solution, then you must find in favor of all of the defendants in this case and against the plaintiffs. [257]

The mere fact that I have in the course of these instructions given you particular instructions concerning a negligence and breach of warranty, is not

to be construed by you as in any way an intimation by this Court that it feels that there has or has not been any proof upon that particular subject, nor are you to construe it as an expression of opinion of this Court upon the subject. The court is required by law to give you instructions upon each theory advanced by the parties. [258]

If you should believe from the evidence that instructions with reference to the use of the cold wave solution in question were furnished the plaintiff, Sandra Mae Nihill, and should further believe that the plaintiff, Sandra Mae Nihill, in the exercise of ordinary care should have followed said instructions and failed to do so, she was guilty of contributory negligence. If you should believe that the plaintiff, Sandra Mae Nihill, was negligent in this regard and that such negligence contributed to the injury and damage, if any, by the plaintiff sustained, your verdict must be in favor of the defendant. [259]

It is immaterial if any warranties were made whether they were true or false if, in fact, the breach of such warranties was not the cause of plaintiff's damages, if any. In order for the plaintiff to recover upon a breach of warranty she must establish by a preponderance of the evidence that the particular warranty which she claims was false and which was breached was the actual cause of the damage. [260]

Although there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be preju-

diced by the fact, if it should become a fact, that you find against the other. The instructions given govern the case as to each defendant, insofar as they are applicable to him, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form. [261]

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. That means negligence is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff, or of any other person. [262]

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct. [263]

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves and to others. [264]

Contributory negligence is negligence on the part of the person injured, which, cooperating with the

negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation. [265]

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies. [266]

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then she has failed to fulfill her burden of proof.

To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or that his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established. [268]

In determining whether negligence or proximate cause, or contributory negligence, or any claim or allegation in this case has been proved by a preponderance of the evidence, you should consider all the evidence bearing either way upon the question, regardless of who produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. [269]

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum. [270]

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for future detriment which, although possible, is remote, conjectural, or speculative.

However, should you determine that the plaintiff is entitled to recover, you should compensate her for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury in question.

You have been and will be instructed in more de-

tail on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent to your deliberations. The fact that such instructions have been given you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict. [272]

When a distributor—and here you recall that the Rexall Drug Company stood in the position of distributor—when a distributor purchases a commodity such as cold wave solution from a manufacturer for resale, he is under no duty to make tests for the purpose of discovering whether or not it has dangerous characteristics. [273]

You are instructed that the defendant Rexall Drug Company was not an insurer of the safety of the plaintiff.

No matter how negligent the defendant may or may not have been, yet if any negligence on the part of the plaintiff, Sandra Mae Nihill, however slight, proximately contributed to the occurrence of the accident, then you are instructed that the plaintiff cannot recover in this action on the issue of negligence.

Neither suspicion, nor speculation, nor surmise is evidence and a verdict cannot be sustained where it depends on suspicion, or surmise, or speculation, or guess work. [274]

The plaintiff, if entitled to recover damages herein, as to any defendant, will not only be entitled

to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant. [275]

The plaintiff claims to have been damaged by reason of breach of certain express warranties made by the defendant, Rexall Drug Company. The burden is on the plaintiff in order for her to recover for the breach of any such warranty to prove by a preponderance of the evidence each of the following facts:

1. That such warranty was, in fact, made by the defendant sought to be charged. That such express warranty was actually communicated to plaintiff.
2. That she relied thereon.
3. That she was justified in such reliance.
4. That the warranty was breached.
5. That she sustained damages.
6. That those damages were the direct and actual consequence of such breach. [276]

You are instructed that the law applicable to this case provides as follows:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after

the buyer knows, or ought to know of such breach, the seller shall not be liable therefor." [277]

The law further provided:

That any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. [278]

You are instructed that in considering damages, whether they could have been anticipated or not, you may take into consideration pain and suffering, embarrassment and humiliation causing mental anguish, all those expenses which have been incurred as a result of the injury and all those expenses which reasonably may be incurred in the future, and any probable embarrassment, mental anguish and loss of income in the future. [279]

Here is an instruction that will be interesting to the jury as a side help, as it were, if you should determine the plaintiff should have damages, then you have a right to take into consideration her age and the probable length of her life.

You are instructed that according to the American Experience Table of Mortality, the expectancy of life of one aged sixteen years is forty-five years.

This fact, of which the Court take judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if any, if you find that plaintiff is entitled to a verdict.

However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question. [280]

If, adhering to the court's instructions, you should find that the plaintiff is entitled to a verdict against either, or both defendants, it then will be your duty to award the plaintiff such amount of damages as will compensate her reasonably for all detriments suffered by her by the negligence of the defendant, Studio Cosmetics Company, or the breach of warranty of the Rexall Drug Company, if any against either defendant, or both, as found by you was a proximate cause, whether such detriment could have been anticipated or not. [281]

Now, when you go to your jury room, the first thing you will do, of course, is to select your foreman, as I have told you heretofore, and proceed to consider your verdict.

The verdict in this case is susceptible of being returned in different forms and, for your con-

venience and not for your instruction, I'll have the clerk prepare forms of verdict which you may examine and adapt to your use as will be required. I'll read them to you so that you may catch the drift of them and understand them when you have reached a verdict, which one to use, and the order of their reading of course intimates nothing as to what verdict should be returned. First, I find on top:

"We, the jury, duly empaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, and against the defendants, Rexall Drug Company, and assess her damages in the sum of $....., and find in favor of the defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company and against the plaintiff, Sandra Mae Nihill."

That, of course, would be the verdict used if you find against Rexall and in favor of the Studio Cosmetics Company. [282]

If you come to the conclusion that neither of the defendants is liable, the form of your verdict would be:

"We, the Jury, duly impaneled to try the above-entitled cause find for the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and against the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill." [283]

If you should find that both defendants are liable, then the form of your verdict would be:

"We, the Jury, duly impaneled to try the above entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular guardian, John Nihill, against the defendant, Arnold L. Lewis, doing business as Studio Cosmetics, and assess her damages in the sum of $....., and find in favor of the defendant, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and against the plaintiff Sandra Mae Nihill." [284]

If you should find against both defendants, then the form of your verdict would so state and say you find in favor of Sandra Mae Nihill and against each of the defendants and assess her damages in the sum of $..... against both of them.

Now, of course the plaintiff is only entitled to one recovery in this suit. She suffered only one injury and if you find against both of them, don't double up because you are finding against both of them, because you find what the injury to her, her damages, are, under these instructions, under the evidence.

If you find against one of them only, then it will normally, naturally, be the same amount, so far as the legal rights are concerned as if you find against both of them. There's one injury, one set of damages, if any, and not more than one set of damages because there are more than one defendant.

If counsel will go with me to Chambers, I will give you a chance to——

(Whereupon, the Court, counsel, and reporter, retired to Chambers, where the following occured out of the hearing of the Jury:)

In Chambers

The Court: Now the plaintiff first.

Mr. Lanier: All right, your Honor. May the record show that the plaintiff excepts to the giving of defendant Studio Cosmetics, instruction requests by attorney Packard, Nos. 1, 9, 21, 47 and 49. May the record further show exception to the instruction request as given for the defendant, Rexall Drug Company, through its attorney Mr. Bradish, No. 2. That's all, your Honor.

The Court: Have you any request for further instruction?

Mr. Lanier: No request, your Honor.

The Court: All right, Mr. Packard.

Mr. Packard: Let the record show the defendant Studio Cosmetics, Arnold L. Lewis, doing business as Studio Cosmetics, objects to the giving of Plaintiff's Amended Instruction Request No. 6, which is an instruction [286] based upon the doctrine of res ipsa loquitar. I have thoroughly gone into the matter, I believe, in my motion for nonsuit and directed verdict. I feel that the instruction is not applicable in a situation where there is testimony of several plausible causes, one of which the defendant would not be responsible or liable. Secondly, I object to the giving of the instruction. The

instruction itself is ambiguous, uncertain, it doesn't properly instruct the jury on the doctrine of res ipsa loquitur, and it does not submit to the jury the doctrine of res ipsa loquitur as a question of fact, but submits the matter to the jury upon a finding by the court as a matter of law that the doctrine is applicable. I object to the giving of the instruction and I state that it is error to give the instruction and further that it was improperly submitted——

The Court: It was the intention of the court to submit certain of the questions upon which the doctrine was based to the findings of the jury. [287]

Mr. Packard: Well, I feel that it does not submit the question of control or the elements of the doctrine of res ipsa loquitur as a question of fact, or whether it was a type of result which would normally follow in the course of human events, it's not for the negligence of the defendant, and the other requisites for the doctrine have not been given in the instruction; that it's uncertain in that they refer to "if you find from the evidence that Sandra Nihill suffered an injury as a proximate result", there's an inference of negligence, and it's uncertain as to what you refer to by an "injury" in the case. Further, the instruction contains the language "that is so, particularly where the event following the use of the product is shown to be that ordinarily not expected", and it's uncertain as to what is referred to as "event following", and I believe it fails to instruct what proximate cause is. I want the record to show that we object to the

instruction—plaintiff's amended instruction No. 6—on those grounds, not limiting our objection to those [288] grounds, but claim the doctrine is not applicable.

The Court: I take it, Mr. Bradish, on behalf of the Rexall people, you wish to join in these objections and exceptions.

Mr. Bradish: I do in this one regard, your Honor, because I feel that the instruction as given does not properly set forth the necessary affirmance that must be found by the jury before the doctrine of res ipsa loquitur is applicable. And, secondly, the wording of the instruction makes it confusing, and does not properly identify the application of it, if any, to the one defendant, Studio Cosmetics Company. I think that the jury could possibly be confused by the wording of the instruction.

The Court: As to that latter objection, of course, if it's subject to that objection, why that would be properly be brought by you and you would be entitled to the exception.

Mr. Packard: Well I just want to show that I except to the giving of that instruction—Amended Instruction [289] Request No. 6.

The Court: Ordinarily, I wouldn't think he was entitled to any exception on that instruction because it only applies to Count One, but on his particular statement that he thinks it may have been misconstrued by the jury, he is entitled to his objection.

Mr. Packard: Then I wish to except to plaintiff's jury instruction No. 7, which states that the manufacturer of a product that is inherently dan-

gerous, or reasonably certain to be dangerous if negligently made, owes a duty to warn, and so forth, upon the basis that there's no evidence in this record to show that the product in question was inherently dangerous. The only evidence shows that it is an alkali, that the contents are not as strong as those contained in a lot of normal home soaps and there's no evidence whatever to show that the solution made in any particular concentration would be toxic or have ill effects. I object and except to that.

The Court: Let the objection be noted and exception entered. [290]

Mr. Packard: I would like the record to show that we have requested No. 7——

The Court: Are you sure it wasn't withdrawn?

Mr. Packard: As a matter of fact, I will waive any further requests for additional instructions, but I just object to and except to instructions given by the plaintiff——

The Court: Well most of them that I didn't give were either conflicting with the cases in existence or were withdrawn in recognition of that fact.

Mr. Packard: Your Honor is right in that regard.

The Court: Now, then, Mr. Bradish.

Mr. Bradish: Yes, your Honor. Your Honor read——

The Court: I might state to you all that when it comes to making up your record or transcript, down at the left-hand corner, in pencil I have noted the number in the [291] order given to the jury, which

might be useful to you in some way. All right, proceed.

Mr. Bradish: Insofar as my exceptions are concerned, I likewise would except to Plaintiff's Instruction No. 7 on the ground that it is confusing in its language and doesn't distinctly restrict its application to the defendant Studio Cosmetics Company, and in more particularity I except to the wording "for which its use is expressly invited by the manufacturer," as being susceptible of confusion in connection with the claim of express warranty and breach thereof by defendant Rexall Drug. Now, your Honor read and gave my defendant's requested instruction No. 16, but your Honor, in so reading it, it reads:

"The plaintiff, if entitled to recover damages herein, as to any defendant, will only be entitled to recover as against any particular defendant such damages, if any, as have been shown by a preponderance of the evidence to have been proximately caused by the acts or omissions alleged in the particular cause of action upon which the plaintiff is proceeding against such defendant." [292]

Your Honor, I am sure, by accident, when you read it, you inserted the word "not" between the word "will" and "only" on line 2, and as I heard the instruction read, it read:

"Plaintiff, if entitled to recover damages herein, as to any defendant, will not only be entitled to recover as against any particular defendant, etc." and with the word "not" in there, the instruction wasn't clear in my opinion.

The Court: Now, what instruction is that?

Mr. Bradish: In my No. 16, your Honor. It probably doesn't mean anything, but I just thought that as long as we were raising our exceptions, I would note that. I think that probably if it was confusing it probably was cleared up.

The Court: I have no indication here that I had in mind to change it in any way.

Mr. Bradish: I know that. I think that you just, as we all do sometimes, you slipped the word "not" in, and perhaps I heard it and it wasn't said, I don't know. Maybe [293] I heard wrong, we would have to check with the reporter. I'm not making any big issue of it, your Honor.

The Court: I don't much believe I made that error. You may have misheard me, but on the other hand I am far from being——

Mr. Bradish: Now, I except, thirdly, to plaintiff's amended instruction No. 8, insofar as it was read from line 12 through and including line 25, on the ground that it includes the words "guarantees delivered to the purchasers with the product," and that's based upon the ground that certain documents contained in the sealed package of wave set were never identified as having been connected with the Rexall Drug Company, and could not be construed to be an express warranty within the meaning of the allegations.

The Court: I have a feeling that the evidence was such that that would have to go to the jury as a question of fact. [294]

Mr. Bradish: All right. Now, just one last thing,

your Honor. After your Honor read the verdict forms to the jury, your Honor made the statement, which I don't think you meant to do, "that the plaintiff was only entitled to one recovery," and I think——

The Court: Well, isn't that true?

Mr. Bradish: Well the plaintiff isn't necessarily entitled to any recovery.

Mr. Lanier: He used the words "if any" though, counsel.

Mr. Packard: He didn't at that time. I have a note. He said, "Now I want to caution you that the plaintiff is only entitled to one recovery here and that you are not to take and apportion between the defendants, but you should return just one sum," and then at the end you said that "if you find she is entitled to a verdict."

The Court: I thought I covered that. [295]

Mr. Lanier: I think you're correct in your memory on that too, counsel, when he first stated it he did not include the words "if any," but when he restated it he did include the words "if any."

The Court: I thought there was a danger inherent there, that the jury would say well we will double up here on this and make a double shot because they are both guilty and they both ought to pay, but that was the thing I had in mind, and I probably shouldn't have touched it at all, but I think I made it clear to them. I believe they understood me.

(Whereupon, the Court, Counsel for the respective parties and the reporter returned to

the court-room and the following occurred in open Court:)

The Court: Now, when you go to the jury room you will be permitted to take the exhibits with you and the forms of verdict, and then you will elect your foreman and if and when you arrive at a verdict, you will note there the place to put the date, also a place for [296] the foreman to sign his name. Be sure and date your verdict and have the foreman sign it for all of you. There's nothing further, gentlemen. The bailiff may take the jury. Let the bailiff be sworn.

(Whereupon, the Clerk administered the oath to the bailiff and matron.)

The Court: You may pass.

(Whereupon, the jury retired to consider their verdict.)

The Court: An order may be entered that when the noon hour is reached, if the jury has not reached a verdict by that time, that they be kept together during the noon hour and given government pay for their lunch. I suppose you have to make some arrangement about that.

The Court will stand in recess.

(Whereupon, Court adjourned.)

Thereafter, at 2:35 o'clock p.m., Court re-convened, upon request of the jury for clarification of the definition of "negligence" as it applies to the law in this case, and the following proceedings were had in open court: [297]

The Court: Who is the foreman of the Jury?

Mr. Thomas: I am.

The Court: Did you send a request to see the Court?

Mr. Thomas: Yes.

The Court: State what your problem is.

Mr. Thomas: Several of the jurors would like to have the law explained to them as to the definition of "negligence," as it applies to the law in this case. Juror No. 1 first brought it up.

The Court: All I know to do is read the instructions that cover the problem of negligence.

Mr. Thomas: That's what we want.

The Court: Well, first, the instructions define negligence as follows: [298]

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. This definition of negligence applies irrespective of whose conduct is in question, whether that of the defendants, or of the plaintiff or of any other person. The definition includes, I would think, for the benefit of the jury, some other instructions, which read as follows:

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. [299]

Then I instructed you with reference to contributory negligence, which would be negligence, if any, on the part of the person making the claim, and that instruction read as follows:

Contributory negligence is negligence on the part of the person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

You will note that in order to amount to contributory negligence, a person's conduct must be not only negligent, but also one of the proximate causes of her injury.

One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

I've used the term "proximate cause."

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

Then I have the further instruction modifying the whole picture. That is to the effect that an accident, in and of itself, is not any evidence of negligence.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. [301] Now in this case is involved the rule of res ipsa loquitur, which was covered by an instruction which I will read to you.

To hold the defendant, Studio Cosmetics Company, liable on Count 1, you must first find defendant guilty of negligence as negligence is hereinafter defined and that the plaintiff, Sandra Mae Nihill, is free of any contributory negligence. If you so find from the evidence, then you should bring in a verdict under Count One, for the plaintiff and against the defendant, Studio Cosmetics Company. That is if you find the defendant, Studio Cosmetics Company, guilty of negligence which was the proximate cause of the injury, and the plaintiff Sandra Mae Nihill was free of contributory negligence, then she is entitled to a verdict.

Then I went on to say, It is your duty to consider and make up your verdict from all the evidence in the case, taking into consideration the rule of evidence that I will now give you. That rule of evidence is known as res ipsa loquitur, that is to say, the thing speaks for itself, and that rule of law is recognized by the Courts as the law in [302] cases similar to this.

That if you should believe, from the evidence in this case, that Sandra Nihill suffered an injury as a

proximate result of the application of the Cara Nome pin curl wave and, if you should believe, from the evidence, that in the application of this product she used all of the instructions put out by the defendant manufacturer, Studio Cosmetics Company, and properly and clearly followed same as put out, and that no tampering had been done with it, and that nothing else caused her injuries, or her condition, then, under the law, you are authorized to draw the inference of negligence, and by that is meant this:

That the rule of evidence applies where the plaintiff cannot have or be expected to have any information as to the manufacture or the ingredients or the effect of the home wave product used, or have any information as to what might result from the use thereof, whereas the manufacturer, Studio Cosmetics Company, must be assumed to have full information of all of these subjects and know just what material and what workmanship were used, and what the effects upon a human being might be from the use of these [303] materials and failed to make known these things to the plaintiff and to the public. That is so particularly where the event following the use of the product is shown to be that ordinarily not expected to occur when the manufacturer uses due care in the manufacture of such a product, and it is not necessary for the plaintiff to go further and prove particular acts of omission or commission on the part of the manufacturer from which the event resulted, but the event itself makes proof of inference of negligence on the part of the manufacturer

from which the jury may infer that the manufacturer was negligent, if the plaintiff has shown by a preponderance of the evidence that the product was manufactured by the defendant and that all instructions put out by the defendant for its application were followed substantially by the one using it, and that the one using this product was injured as a proximate result, then that inference of negligence arises, but it is not conclusive; it is an inference of negligence that the plaintiff is entitled to have received without further proof. [304]

Now as far as I know that covers the instructions that the court gave to you in reading these very long series of instructions. I'm not surprised that you forget, perhaps, concerning some of them. If that meets the problem.——

Mr. Thomas: Juror No. 8 has a question, your Honor.

The Court: I hate to start the idea of talking to all the different jurors. Do you know what the question is?

(Juror No. 8 confers with the foreman, Mr. Thomas.)

The Court: I might say this to you. I can hear you talk about the testimony, but this court can't comment on the testimony in any way at all or the weight to be given to any testimony.

Mr. Thomas: The juror is under the impression that Mr. Lewis didn't have any formula for this pin curl and I guess he wants it read out of the record just what the testimony was on that. Is that right?

The Court: Well it can be stipulated, can it not,

that there was [305] proof of a formula used by Mr. Lewis?

Mr. Bradish: I'm willing to stipulate.

Mr. Packard: I'm willing to stipulate.

Mr. Bradish: Formula pursuant to patent and license.

The Court: Wasn't that the proof, Mr. Lanier?

Mr. Lanier: I don't know if this is the proper time and place to do that, your Honor. I am trying now to recall the testimony. My recollection is that there was no formula; that he was asked to produce——

Mr. Packard: Just a moment. I'm going to interrupt. I think I stated—and I wanted to read certain testimony to this jury and this jury is entitled to have this entire record——

The Court: I heard you make that statement to the jury, Mr. Packard, and I wasn't very happy about it at the time, but there was no objection made and I didn't raise any objection myself, but the trouble with [306] that is when you read the record back to the jury, there then probably should be some opportunity for counsel to comment on that and have some other part of the record read and what not.

Mr. Packard: I think if the jury — and I am going to insist that if the jury requests any portion of this record read back to them that it be read back.

The Court: You haven't any right to insist that this jury do anything, Mr. Packard.

Mr. Packard: Well, I'm going to insist the Court

permit the reporter to read any testimony to the jury that the jury deems necessary for their determination of any issues in this case. They are entitled to have any testimony of any witnesses read back to them if they need that in their deliberations. I think that fact should be known to them.

The Court: What's your position on that Mr. Lanier?

Mr. Lanier: If the Court please, my position is only this, that is a matter which of course has always been discretionary [307] with the court and in all federal courts it is not permitted—once any one piece of testimony is singled out for unusual consideration after the testimony is given, after the case is in, it just means opening a series for constantly reading back other testimony to explain——

The Court: I'm inclined to agree with Mr. Lanier. Not that I wouldn't want to help the jury in every way I could, but I think—it has never been the practice in my court—it has never been the practice in my area—what's been the practice here, of course, I being a stranger, I don't know, but I'm going to deny Mr. Packard's request.

Mr. Packard: I would like to have the record show I make exception to the court's ruling that the jury is not permitted to have testimony read back.

The Court: You may have the exception. Let me suggest this to the jury, that you go back to your jury room and you put your assembled minds together and see if you can't arrive at what the evidence was on the particular point that you have in mind that [308] you are uncertain about, and if you

finally get to a point where you are at an impasse where you can't make any progress and you have some question you feel like the court could help you with, I think it has been the practice in this court, and I think it's a good practice, that the foreman reduce the question to writing and bring it into court in writing so the court and counsel can have a chance to see the question. Now you may return to your jury room.

Mr. Thomas: There's one other question. In order to reach a verdict, do we have to be unanimous?

The Court: Yes.

(Whereupon, the jury again retired to continue their deliberations.)

Mr. Bradish: For the record, on behalf of the defendant, Rexall Drug Company, and all due respects to your Honor's ruling and discretion, I would like to join in Mr. Packard's exception to your Honor's ruling that no testimony from the record, if [309] requested by the jury, could be read to the jury, and I did not raise the objection or the exception at the time because I felt that there had been enough discussion in the presence of the jury.

The Court: I appreciate that, Mr. Bradish; I think you are entitled to your exception.

Mr. Packard: I believe the record shows that I did except and I think the record further shows, in my closing argument, I stated to the jury that they had an opportunity to come back and have any portion of the record read to them, and there was no objection made at the time I made my argument, and now when the jury has been present here to

have certain instructions re-read and indicated they wanted certain testimony re-read, they have been denied the right of having that testimony re-read. I submit the Court is in prejudicial error.

The Court: In my judgment, counsel was out of order when he made that statement to the jury without first [310] consulting the court about it.

Mr. Packard: I think the record shows that I had ordered a transcript in this case of the testimony of one of the doctors and the reporter told me she would check with you as to whether I could get that transcript and so forth, and I thought everybody knew that I intended to read the transcript——

The Court: That doesn't follow at all Mr. Packard. It's a regular custom, particularly in larger cities in the middle West, and Chicago, that they get daily copies of all the evidence, so they will know what to ask the next witness.

Mr. Packard: I think the record shows how I feel about the matter.

Mr. Bradish: Your Honor, off the record.

(Discussion off the record.)

Mr. Packard: Let the record show that I also except to the re-reading of plaintiff's Instruction No. 6 on res ipsa loquitur, on the grounds stated after the [311] original charge to the jury, and I want the record to show my exception.

The Court: I certainly think you are entitled to your exception.

(Whereupon, the Court again recessed, and at 5:10 o'clock p.m. called the jury to the court-

room and the following proceedings were had in open court:)

The Court: I don't suppose you have ever had the experience of sitting in chambers and waiting for a jury. I begin to get curious as to how the jury is getting along. Mr. Foreman, are you making progress?

Mr. Thomas: Yes, your Honor. I think within another hour, probably an hour and a half, we can come to a verdict.

The Court: I just wanted to know if you are making progress. [312]

Mr. Thomas: Oh, yes, we are making considerable progress.

The Court: If you are, I will permit you to go back to the jury room and continue to work. The bailiff may take the jury.

(Thereupon, the jury again retired to consider their verdict.)

The Court: The court will recess.

(Whereupon, Court recessed and, at 6:40 p.m., Court reconvened and the following proceedings were had in open court:)

The Court: Mr. Foreman, have you a report to make?

Mr. Thomas: Yes, your Honor, we have arrived at a verdict.

The Court: Will you pass your verdict to the Clerk? The Clerk will read the verdict.

The Clerk: "We, the jury, duly impaneled to try the above-entitled cause, find for the plaintiff, Sandra Mae Nihill, a minor, by her father and regular

guardian, John Nihill, [313] and against the defendants, Rexall Drug Company, a corporation, doing business as Cara Nome Rexall, and Arnold L. Lewis, doing business as Studio Cosmetics Company, and assess her damages in the sum of $48,000.00.

Dated: April 16, 1958, at Los Angeles, California.

/s/ EARLE H. THOMAS,
Foreman of the Jury."

The Court: Is that the verdict of each and everyone of you?

Mr. Thomas: Yes, sir.

The Court: Any request for a poll?

Mr. Packard: I would like to have the jury polled.

The Court: The Clerk will poll the jury?

The Clerk: Ruth H. Swenson, is this your verdict as presented and read?

Miss Swenson: Yes, it is. [314]

The Clerk: Wyman G. Acton, is this your verdict as presented and read?

Mr. Acton: It is.

The Clerk: Ruth C. Berghoefer, is this your verdict as presented and read?

Miss Berghoefer: Yes, it is.

The Clerk: Frank D. Obenour, is this your verdict as presented and read?

Mr. Obenour: Yes sir.

The Clerk: Elmer M. Greening, is this your verdict as presented and read?

Mr. Greening: Yes, sir.

The Clerk: Gene D. Whitfield, is this your verdict as presented and read? [315]

Mr. Whitfield: Yes, it is.

The Clerk: Earle H. Thomas, is this your verdict as presented and read?

Mr. Thomas: Yes.

The Clerk: Wilson L. Venton, is this your verdict as presented and read?

Mr. Venton: It is.

The Clerk: Joseph L. Hancock, is this your verdict as presented and read?

Mr. Hancock: Yes, it is.

The Clerk: Lorraine Tawam, is this your verdict as presented and read?

Miss Tawam: Yes, it is.

The Clerk: Lillie A. Mitchell, is this your verdict as presented [316] and read?

Miss Mitchell: Yes.

The Clerk: Frances Brayton, is this your verdict as presented and read?

Miss Brayton: Yes.

The Court: Again, I wish to thank the jury for your very patient attendance on this session of the court and the manner in which you listened to the evidence and arguments of counsel and instructions of the court, and the way you worked so diligently since you went to the jury room to arrive at a verdict. It's a rather tragic thing—since the case is over we can say this to you—it is a rather tragic thing to have a jury fail to reach a verdict. Of course the court has no interest in what the verdict should be just so long as it is by twelve jurors, but twelve

jurors have to decide the case sometime because that's the only way that you can decide it. It always grieves me a great deal to have to let a jury have a mistrial because of failure to [317] agree. We will stand in recess.

(Whereupon, at 6:45 o'clock p.m., the hearing was closed.) [318]

[Endorsed]: Filed November 24, 1958.

[Endorsed]: No. 16282. United States Court of Appeals for the Ninth Circuit. Rexall Drug Company, a corporation, and Arnold L. Lewis, doing business as Studio Cosmetics Company, Appellants, vs. Sandra Mae Nihill, a minor, by her father and guardian John Nihill, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 10, 1958.

Docketed: December 11, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16282

REXALL DRUG COMPANY, a corporation, doing business as Cara Nome, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company, Appellants,

vs.

SANDRA MAE NIHILL, a minor, by her father and regular guardian, John Nihill, Appellee.

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD PURSUANT TO RULE 17, SUBDIVISION 6

Comes now the appellant Rexall Drug Company, a corporation, and states the points upon which it intends to rely on appeal, as follows:

1. The evidence is insufficient to support the verdict and judgment against the appellant.

2. There was no evidence of any express warranty by the appellant to the appellee or to anyone acting on her behalf.

3. There was no privity of contract between appellant and appellee.

4. The damages awarded to appellee were clearly excessive.

5. The District Court committed prejudicial error in receiving in evidence, over objection, certain advertisements, without proper foundation to show

that the appellee had ever seen or relied upon the advertisements.

6. The court committed prejudicial error in receiving in evidence, over objection, advertisements which were printed after the alleged injury to appellee.

7. The court committed prejudicial error in receiving into evidence, over objection, the testimony of two witnesses with reference to the application of hair solution, with no proper foundation to show that the conditions were the same or similar.

Appellant designates the entire record and all of the material heretofore designated by it in the Designation of Record on Appeal filed with the District Court as being material to the consideration of this appeal and the review of the judgment.

SPRAY, GOULD & BOWERS,
/s/ By PHILIP L. BRADISH,
Attorneys for Appellant
Rexall Drug Company.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 18, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD PURSUANT TO RULE 17, SUBDIVISION 6

Comes now the appellant Arnold L. Lewis, and states the points upon which he intends to rely on appeal, as follows:

1. The judgment is not supported by the evidence.

2. The evidence was insufficient as a matter of law to establish that the appellant, Arnold L. Lewis, was guilty of any actionable negligence which was a proximate cause of any injury or damage sustained by the appellee.

3. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

4. The court committed prejudicial error in instructing the jury upon the doctrine of res ipsa loquitur, over objection of the appellant.

5. The court committed prejudicial error in permitting into evidence the testimony of Mrs. Carl Carlson and Mrs. Donald Carlson.

6. The court committed prejudicial error in giving certain instructions over the objection of appellant.

7. The court particularly committed prejudicial

error in instructing the jury upon the doctrine of res ipsa loquitur.

Appellant designates the entire record and all of the material heretofore designated by it in the Designation of Record on Appeal filed with the District Court as being material to the consideration of this appeal and the review of the judgment.

REED, CALLAWAY, KIRTLAND & PACKARD AND HENRY E. KAPPLER,

/s/ By HENRY E. KAPPLER,

Attorneys for Appellant Arnold L. Lewis.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 18, 1958. Paul P. O'Brien, Clerk.

No. 16,283

IN THE

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

EDGAR PAUL BOYKO,
ARTHUR D. TALBOT,
211 Turnagain Arms, Anchorage, Alaska,
Attorneys for Appellants.

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IN THE

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

This action was commenced on June 21, 1956 in the District Court for the Territory of Alaska, which had general civil jurisdiction, both local and Federal, without regard to the presence or absence of diversity of citizenship or a federal question. 48 USC Sec. 101 (31 Stat. 322).

This appeal is taken from a judgment for the plaintiff-appellee entered on June 12, 1958 upon a general jury verdict, pages 71-73 of the Transcript of Record (hereinafter referred to as "R"). The trial judge was the Honorable Harry C. Westover, U. S. District Judge for the Southern District of California, as visiting judge. All parties waived any question of the power or jurisdiction of Judge Westover or the court to try the case (R 155).

Notice of appeal to this Court was duly filed on July 17, 1958 (R 74), the time to appeal having been extended by a timely motion for judgment notwithstanding the verdict and for a new trial (R 67), which was denied on June 20, 1958 (R 66, 73).

Jurisdiction to hear this appeal was conferred upon this Court by 48 USC 1291, 1292 and 1294. The appeal was docketed on December 12, 1958 (R 396), whereas Alaska did not become a State and the statutory amendments relating to the jurisdiction of this Court to hear appeals from the District Court for the Territory of Alaska did not become effective until January 3, 1959 (Alaska Enabling Act, Act of July 7, 1958, 72 Stat. 339).

STATEMENT OF THE CASE.

On October 24, 1955 appellants, through their Seattle agent, Farwest General Agency, (a trade name of former defendant D. K. MacDonald & Co., R 10) agreed to insure one of plaintiff's aircraft known as

Cessna 1569 Charley (R 161-62). The face sheet of the policy, (plaintiff's Exhibit No. 1) is reproduced as page 111 of the printed record. The reverse side of this document, containing the disputed provisions of the policy, is set forth as page 142 of the printed record, by inadvertence. Page 142 is labeled "Exhibit A", but this reference is not to a trial exhibit but, rather, what is now page 142 of the printed record was originally "Exhibit A" annexed to appellants' answer to the plaintiff's complaint (R 15). Pages 111 and 142 of the printed record together constitute Plaintiff's trial exhibit No. 1 (R 47, 110, 167).

Appellants, hereinafter referred to as "underwriters", insured appellee in the sum of $15,200.00 against the loss of Cessna 1569 Charley, and the parties agree that appellee (hereinafter referred to as "the airline") is entitled to the full $15,200.00 if it is entitled to recover anything on the policy of insurance (R 154).

On December 18, 1955 Cessna 1569 Charley was totally destroyed except for a few parts salvaged by underwriters. The aircraft crashed while approaching the airstrip at Big Mountain, located near the South shore of Iliamna Lake, on the Alaska Peninsula. The pilot, Herbert N. Haley, was instantly killed (R 162, 291, 243).

Cessna 1569 Charley was on a ninety-day general charter from Cordova Airlines to Morrison-Knudsen Co., a government contractor engaged in the construction of a radar site on top of Big Mountain (R 126-27, 159-160, 242).

Various parties were substituted or dropped both before and during the trial (R 20, 38, 154, 164) but no question is presented concerning this realignment. The action finally resolved itself into a claim by Cordova Airlines, Inc. against Underwriters at Lloyds and certain participating Canadian underwriters, as set forth in the caption of the case on appeal.

The defenses asserted by the underwriters all arise out of the fact that on the flight on which it crashed Cessna 1569 was overloaded, with a cargo of dynamite.

By reason of certain CAB regulations which are hereinafter considered in detail, the dynamite carried by Cessna 1569 Charley was a prohibited Class A explosive which could not lawfully have been carried without a prior waiver from the CAA. The failure to obtain a CAA waiver rendered the flight unlawful. The flight was made by a regular Cordova Airlines pilot whose knowledge of the unlawful carriage must be attributed to the airline. Thus coverage was voided by the language of General Exclusion 4, which provides that the policy does not cover "the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured" (R 142).

A CAA waiver being required for this flight, and no consent having been asked for or received from the underwriters' agent, Farwest General Agency, coverage was voided by the terms of General Exclusion 1(c), which excludes coverage for "any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers" (R 142).

The overloading issue involves General Condition number 2, which provides:

> "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. Approved Operations Manual, and in accordance with operations authorized as set forth therein." (R 142.)

The Approved Operations Manual for Cessna 1569 Charley sets a maximum gross weight for the aircraft when loaded with cargo, etc. Underwriters offered a witness who testified that he counted the remains of sixteen dynamite cartons in the wreckage (R 266-273) which, at fifty-three pounds per case, plus the pilot, fuel, etc., undoubtedly made the aircraft overloaded. On the other hand, the airline produced a witness who testified he made a careful check and was able to locate the remains of only eight dynamite cartons. If only eight cartons of dynamite were on board then doubt is cast upon the claim of overloading. This of course was a question for the jury, which brought in a verdict for the airline. The difficulty is that the court, over the objections of counsel for both sides, insisted upon giving the jury completely opposite instructions as to whether or not they were obliged to find some causal connection between the breaches of the policy and the crash itself. These conflicting instructions are set forth in the Specification of Errors, infra. Because of the conflicting instructions, it is impossible to know whether the jury found that the aircraft was *not* overloaded, and hence brought in a verdict for the plaintiff, or whether they found that

the aircraft *was* overloaded, but brought in a verdict for the plaintiff anyhow because they took to heart those portions of the court's instructions requiring the jury to find, in addition to the overloading, some causal connection between the overloading and the crash. It is for this reason that appellants contend they are entitled to a new trial on the issue of overloading.

A new trial should not be necessary, however, because appellants are entitled to judgment against the plaintiff on the dynamite issue, as a matter of law. The facts concerning the carriage of dynamite are not disputed, the only question being how much was carried. Although admitting that dynamite was carried, and although the CAB regulations prohibit the carriage of dynamite, plaintiff sought to justify its conduct by falling back upon the provisions of CAB Order Number S-712, dated December 2, 1955 (Defendants' Exhibit A, Appendix A hereto), claiming this order constituted blanket permission for this airline to carry dynamite without a CAA waiver. Any reading of Order S-712 reveals however that that regulation merely authorized the U. S. Air Force, not Cordova Airlines, to transport certain security-classified Class A explosives (not ordinary dynamite) in civil aircraft chartered for the exclusive purpose of transporting such explosives (which was not the case here), with certain other safeguards as to shipping and handling, none of which were observed by Cordova Airlines on the flight in question. In spite of the obvious inapplicability of the regulation to Cor-

dova Airlines, the court submitted that issue to the jury, and declined thereafter to disturb what was a legally indefensible verdict.

SPECIFICATION OF ERRORS.

1. The court erred in instructing the jury that:

   "If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense." (R 358.)

Defendants objected to this instruction on the grounds that underwriters are not obliged to demonstrate any causal connection between the overloading, which was a breach of the policy, and the crash (R 367-368, 326).

2. The court erred in instructing the jury that:

   "If you believe that the defendants' Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1(c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from' and was 'the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

> "If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants on this issue." (R 362.)

Defendants made the same objection to this instruction, namely, that underwriters had no burden to prove any causal connection between breaches of the policy provisions and the crash (R 367-368, 326).

3. The court erred in giving the jury completely contradictory instructions concerning the necessity of finding a causal connection between breaches of the policy and the crash. The instructions on this point quoted in the preceding specifications of error were intermingled with precisely contrary instructions, that the jury need not find any such causal connection:

> "You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur." (R 357.)

The conflicts between the various instructions given on the point of causal connection between breaches of the policy and the crash were objected to and pointed

out to the court by counsel for both sides (R 367-368, 329-330, 334-338, 379-381).

4. The court erred in instructing the jury that:

> "If you find that there is any ambiguity in this contract or in the insurance policy between the general exclusions and the general conditions—you will remember that counsel talked to you about exclusions and conditions. If you find that there is any ambiguity between the general exclusions and the general conditions, you are instructed that the insurance policy in this case was written by the defendant insurance company and inasmuch as the defendant wrote the policy the language thereof must be interpreted and construed most favorably to the insured and against the insurer. And when the language is susceptible of two constructions it should be construed most favorably in favor of the insured.
>
> "Exceptions and conditions are construed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the construction must be adopted which is most beneficial to the insured." (R 356.)

Defendants objected to this instruction because interpreting the policy is a duty of the court and not a question for the jury (R 338-341, 48, 143).

This instruction is in direct conflict with a previous instruction given:

> "All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the *construction* of statutes *and other*

writings, and other rules of evidence *are to be decided by the Court* * * *." (R 348.) (Emphasis supplied.)

Nowhere in the record is there any indication that the court found any actual ambiguities whatever in the pertinent provisions of the policy. The instruction given constituted an open invitation to the jury to find ambiguities where none exist, and to construe the policy for the court, instead of the other way around.

5. The court erred in refusing to give the jury the following portions of defendants' proposed instruction number 1:

> "Accordingly, if you find that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, and if you further find that no special waiver was secured from the Civil Aeronautics Authority for the flight in question, and that the purpose of the flight was for the transportation of dynamite, then you are instructed that the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines, and your verdict must be for the defendants and against the plaintiff." (R 52.)

General Exclusion 4 provides that the policy does not cover "the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured". (R 142.)

It is undisputed that the purpose of the flight was to transport a quantity of dynamite. The carriage of dynamite without a waiver from the CAA was unlaw-

ful, and the jury should have been so instructed. Defendants objected to the court's failure to give a proper instruction on this point (R 327, 331, 226-227, 109, 341, 373, 389).

6. The court erred in denying defendants' motion for a directed verdict (R 48). It is undisputed that the purpose of the flight in question was to transport a quantity of prohibited Class A explosives, namely, dynamite, without the required waiver from the CAA for such a flight, and without the permission of Farwest General Agency, as agent for underwriters. The carrying of prohibited explosives under these circumstances was unlawful, and constituted a violation of General Exclusion 1(c) and General Exclusion 4 of the policy (R 142).

On the undisputed facts defendants were entitled to judgment as a matter of law and a verdict should have been directed.

7. The court erred in denying defendants' motion for a new trial (R 67). The conflicting and improper jury instructions rendering the jury verdict valueless were pointed out to the court in the motion itself and in the argument had thereon (R 67, 379-381).

8. The court erred in giving the following instruction to the jury:

> "In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit com-

mencing on page 3 the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from the Civil Aeronautics Authority.

"In this connection you are instructed that the Civil Aeronautics Act defines 'United States' as:

'United States' means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof.'

"The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

"If you believe that Defendants' Exhibit A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense." (R. 361-362.)

Plaintiff does claim that it was given authority to carry dynamite by the terms of CAB Order Number S-712 (Defendants' Exhibit A, Appendix A hereto). The question of whether or not this regulation actually applied to Cordova Airlines was put to the jury, contrary to defendants' objections that the interpretation of the applicable regulations was a matter for the court (R 109, 328, 373).

9. The court erred in denying defendants' motion for judgment notwithstanding the verdict. It was admitted that the plane was used with the knowledge and consent of the airlines (through its pilot) for the transportation of dynamite, without a waiver from the CAA, and without the permission of underwriters' agent, Farwest Central Agency. It flows from this that the plane was used in flying for which a CAA waiver was required, without underwriters' consent, in violation of General Exclusion 1(c) of the policy, and also that the plane was used for an unlawful purpose with the knowledge and consent of the assured, in violation of General Exclusion 4. Each of these defenses being complete defenses to the plaintiff's complaint, judgment should have been entered for the defendants notwithstanding the verdict, in accordance with defendants' motion (R 67-70, 373-379) which incorporated and repeated defendants' motion for directed verdict (R 48-50).

10. The court erred in giving the following instruction to the jury:

> "The defendants contend, among other defenses, that Paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:
>
> 'This certificate and/or policy does not cover the use of the aircraft for any unlawful pur-

pose if with the knowledge and consent of the assured.'

"This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

"In this connection you are instructed the word 'purpose' is defined as 'the object; effect, or result, aimed at, intended, or attained.'

"You are instructed that the meaning of the word 'use' is defined as: 'The purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved.'

"You are also instructed that the policy of insurance here involved in Paragraph 8 reads as follows:

'Purposes for which aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.'

"If you find that the Defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

"In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc.

"If you find that the defendants have proven by a preponderance of the evidence in attempting to transport dynamite the airplane was being used for an unlawful purpose then you must consider whether or not such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines." (R 358-360.)

This instruction was duly objected to (R 327-328), upon the grounds that the construction of the policy was a duty of the court and not a question for the jury, there being no ambiguity in the policy in respect of which any evidence was received, and there being no dispute concerning the issuance or wording of the policy.

ARGUMENT.

I. UNDERWRITERS NEED NOT SHOW THAT THE BREACHES OF THE CONDITIONS AND EXCLUSIONS OF THE POLICY RESULTED IN THE CRASH.

The first two errors specified by appellants concern instructions given to the jury to the effect that underwriters had the burden of proving that the crash was caused by overloading and by the airline's failure to secure permission from the CAA to carry dynamite It is submitted that as a matter of law no such connection need be shown.

Appellants' position is supported by the decision of the Court of Appeals for the Fourth Circuit in 1955 in *Bruce v. Lumbermen's Mutual Casualty Co.*, 222 F 2d 642. In that case the deceased was killed

while a passenger in an airplane engaged in aerobatic flight without a parachute. Parachutes would have been of no avail to save the lives of the occupants, because the pilot continued to execute the spins until the plane was so near the ground that parachutes could not have been used effectively. Aerobatic flight without parachutes violated the applicable CAA regulations. The policy provided that it should not apply:

> "(d) To liability with respect to bodily injury or damage caused by the operation of the aircraft with the knowledge of the named insured; (1) if used for any unlawful purpose, or, during flight or attempt thereat, in violation of any government regulation for civil aviation." (Opinion, page 644.)

Recovery was nevertheless sought because there was no causal connection between the violation of the regulation and the fatal crash. In rejecting this contention, the court held:

> "The clear meaning of the policy is not as the appellant suggests that the risk is excluded if the injury is caused by a violation of the regulations, but that the risk is excluded if the injury is caused by the operation of the plane *while* it is being used in violation of the regulation. It is established by the great preponderance of authority in the decisions of this and other courts that an insurer need not show a causal connection between the breach of an exclusion clause and the accident, if the terms of the policy are clear and unambiguous, since the rights of the insured flow from the contract of insurance and not from a claim arising out of tort." (Opinion, page 645.)

The same result was reached by the Court of Appeals for the Eighth Circuit in 1956 in *Globe Indemnity Company v. Hansen,* 231 F 2d 895. This case also involved a claim for the death of a passenger in a plane flying in violation of CAA regulations and applicable state law by intentional aerobatics without parachutes below the prescribed minimum altitude (Opinion, page 905). The policy provided that it did not apply to any insured:

> "(b) who violates or permits the violation of any governmental regulations for civil aviation applying to aerobatics, instrument flying, minimum safe altitudes, repairs or alterations;
>
> "(c) who permits, performs or attempts to perform aerobatics during which the aircraft is intentionally operated at an altitude of less than 1,000 feet above the terrain * * *."

The court found that the exclusions in the policy were not against public policy, and that it was not necessary that the acts excluded by the policy cause the accident, citing with approval *Bruce v. Lumbermen's Mutual Casualty Company,* 222 F 2d 642, supra (Opinion, page 897).

In the case of *DesMarais v. Thomas* (N Y Sp Ct, 1955) 147 N Y S 2d 223, an Alaska claim successfully defended against by underwriters under a similar policy of hull insurance, the court held:

> "Defendant need not show any causal connection between the accident and non-compliance with the condition stated in the exclusion clause." (Opinion, page 226.)

The latest federal case directly in point, decided by the Court of Appeals for the Fifth Circuit on June 30, 1958 (only a few days after the verdict in the instant case) is *Lineas Aereas Colombianas Expresas v. Travelers Fire Insurance Co.*, 257 F 2d 150. This plane crashed during take-off at Leon, Mexico while operated by two Mexican pilots. The policy provided that it should apply only while the plane was being flown by pilots holding U. S. CAB certificates or comparable licenses issued by Colombian air authorities, and neither pilot met these qualifications. Liability was also denied because the plane was being operated with the knowledge and consent of the assured unlawfully and in violation of U. S. civil air regulations. In upholding the terms of the policy the court stated: "What the factors are which insurers consider to be of underwriting importance is not for us to assay" (Opinion, page 154). The court went on to say:

> "* * * it will not do for the Assured to say that with respect to this loss these admitted violations or actions were of no consequence. To do so would first amount to allowing Judge or Jury, unaffected by the painful prospect of paying a claim, to determine what factors are or are not of relative importance in evaluating a risk either for the scope of protection afforded, the nature of protective limitations required, or the cost in terms of premiums."

Not only do the preceding cases represent the weight of authority, but appellants are aware of no decisions whatever holding that in suits under a policy

of hull insurance for accidental loss of aircraft underwriters are required to show that the acts violating exclusions in the policy actually caused or contributed to the crash.

II. DYNAMITE WAS CARRIED IN VIOLATION OF EXCLUSIONS IN THE POLICY.

The fifth, sixth, ninth and tenth errors specified by appellants involve the carriage of dynamite in violation of existing civil air regulations, contrary to two exclusions in the policy.

The first exclusion is number 1 (c), which reads:

> "This Certificate and/or Policy does not cover: * * *
>
> "(c) * * * any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers." (R 142.)

The airline corporation was examined before trial by the oral deposition of Mr. Merle K. Smith, its president. Mr. Smith admitted that the airlines did not apply for a special permit to carry explosives on the flight in question (R 99). This admission was repeated by Mr. Smith in his testimony at the trial (R 316). Mr. Smith also admitted that he knew the coverage was arranged through Farwest General Agency in Seattle (R 162), and that the airline did not secure permission from Farwest General Agency to make the flight with dynamite (R 231). The final question under this exclusion, then, is whether a CAA waiver

was required for this flight. If such a waiver was required, then clearly General Exclusion 1(c) was violated.

The applicable regulations governing the carriage of explosives in civil aircraft were those promulgated by the Civil Aeronautics Board, and are found in 14 CFR, Part 49, beginning at page 276.

> Section 49.0 provides: "*Applicability of part.* Explosives or other dangerous articles * * * shall not be loaded in or transported by civil aircraft in the United States, or transported anywhere in air commerce in civil aircraft of United States registry except as provided in this part."
>
> Section 49.81 provides: "*Prohibited articles.* No explosive or dangerous article listed in the ICC Regulations (49 CFR Part 72) as an Explosive A, * * * shall be carried on aircraft subject to the provisions of this part."

The said ICC Regulation classifying explosives (49 CFR Sec. 72.5) classifies "dynamite" as a "high explosive", and all high explosives are designated as "explosives A" by the same section. Thus it appears (nor was it controverted at the trial) that dynamite is an explosive A the carriage of which is forbidden on aircraft subject to the regulations, unless special authority was first secured from the Administrator of the CAA. The authorization for such a deviation was contained in 14 CFR Section 49.71, which provided:

> "*Special authority.* In emergency situations or where other forms of transportation are impracticable:

(a) Deviations from any of the provisions of this part for a particular flight may be authorized by the Administrator where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo."

Thus it is established without resort to any disputed issue of fact that a CAA waiver was required for the carriage of dynamite, that no waiver was applied for, and that permission for the flight in question was neither sought from nor given by Farwest General Agency—a plain violation of Exclusion 1(c) of the policy. That the cargo carried was dynamite was freely admitted by the airline (R 36-37, 87, 126, 231, 232).

A question may conceivably arise as to the reasonableness of the provision in the policy that prior written approval be obtained from underwriters agent, Farwest General Agency, for any flight for which a CAA waiver was required. A similar question was raised in *DesMarais v. Thomas,* 147 N.Y.S. 2d 223, supra, where the policy provided that it did not cover any loss arising from piloting other than by pilots described in a schedule annexed to the policy "as approved by D. K. MacDonald and Company", through whom, as in the case at bar, the airplane was insured for Underwriters at Lloyd's, London. The pilots in charge of the plane in the *DesMarais* case had not been approved by D. K. MacDonald and Company, and the court, in denying coverage, held:

"There can be no question, it seems to me, that no triable issue whatsoever is created concerning

the co-pilot's admitted non-possession of the necessary credentials, whatever the good faith of plaintiff in hiring him. Exclusion from coverage on that specific ground at least must be held to follow. But, even as regards the first pilot, there has been no showing that the requirement for MacDonald's approval was unreasonable or against public policy and should not be enforced in accordance with the clear agreement of the parties. We are not faced here with the problem of determining whether, had this pilot's name and papers been submitted to MacDonald and approval unreasonably refused, coverage nevertheless should be adjudged for an accident loss involved in a flight piloted by him in the necessary prosecution of plaintiff's business. My conclusion is that plaintiff has by his own neglect prevented a recovery under this policy."

Underwriters' contentions respecting the airline's undisputed violation of General Exclusion 1(c), were made plain to the court below in defendants' Fourth Affirmative Defense (R 45), at the pre-trial conference (R 113, 117, 119-128), in defendants' timely motion for a directed verdict (R 48-50), in defendants' motion for judgment notwithstanding the verdict (R 67-70) and in the argument on that motion (R 373-379).

Although conceding that questions of law are for the court and not the jury, the court in formulating its instructions to the jury, consistently declined the task of analyzing the various CAB regulations and orders. Instead, the entire issue of the applicability of CAB Order S-712 (Appendix A hereto) was left to

the jury (R 361-362). Similarly, the court declined to instruct the jury, as requested by defendants, that if dynamite was knowingly carried without a CAA waiver, then the aircraft was being used for an unlawful purpose (R 52). Instead of receiving proper instructions thereon, the jury was given the regulations to puzzle out for itself in the privacy of the jury room, as exhibits in the case (Plaintiff's Exhibit 2 and Defendants' Exhibit A) (R 369-370, 391).

We reject as undue modesty the learned trial judge's statement: "I have read Government regulations from time immemorial and I can't understand them" (R 312). Instead, we insist on the verity of the court's statement: "Well, if that is typical of a Government regulation somebody has to explain it * * *" (R 312). That "somebody" is, in the final analysis, we submit, none other than the trial judge himself, reluctant though he may be to undertake the thankless task.

III. CIVIL AERONAUTICS BOARD ORDER S-712 NOT APPLICABLE TO CORDOVA AIRLINES.

The eighth error specified by appellants concerns the instruction by which the court left to the jury the issue of whether or not Cordova Airlines was given blanket authority to carry dynamite on the flight in question by reason of CAB Order S-712 (Appendix A hereto). This regulation was tossed into the lap of the jury (R 361-362), so to speak, in spite of the fact the court first instructed the jury that:

> "All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the construction of statutes and other writings, and other rules of evidence are to be decided by the court and all discussions of law addressed to the court; * * *." (R 348.)

There is no evidence linking Cordova Airlines with Order S-712. As a matter of fact, several months *after* this crash, on June 1, 1957, the contractor to whom the airlines had furnished Cessna 1569 Charley on a ninety-day general charter, finally persuaded the CAB to issue its regulation number SR-417 (21 F. R. 3776) specifically authorizing designated operators of aircraft, including Cordova Airlines, to handle class A explosives by air, under the conditions set forth in said regulation. Cordova Airlines did not claim retroactive benefit from regulation SR-417. Instead it claimed to have received blanket authority to carry class A explosives under Order S-712.

It is submitted that this particular flight by Cordova Airlines cannot conceivably be held to have been contemplated or authorized by Order S-712, for the following reasons:

A. The Department of the Air Force had nothing to do with this flight, except that Morrison-Knudsen Co., Inc. was in fact engaged on an Air Force contract (R 160) and the dynamite was government property (R 155).

B. The little strip the contractor built on top of Big Mountain on the south shore of Iliamna Lake was not a "military airport terminal" (R 242-243).

C. Cessna 1569 Charley was not obtained for the exclusive purpose of transporting shipments of class A explosives (R 159-160, 242).

D. These explosives did not originate at Tucson, Arizona, nor were they shipped to an Air Defense Command Base (R 243-246).

E. There is no evidence that the Air Force certified that this shipment of "security classified class A explosives" was in accordance with corresponding provisions of the ICC regulations for shipment of explosives by rail.

IV. THE AIRCRAFT WAS BEING USED FOR AN UNLAWFUL PURPOSE.

The fifth error specified by appellants is the court's refusal to instruct the jury to return a verdict for the defendants if they found that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, without a special waiver from the CAA, for the reason that, on these facts, the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines (R 52, 330-331).

As demonstrated in points II. and III., supra, the dynamite was carried in violation of CAB regulations. General Exclusion 4 provides that the policy does not cover "the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured" (R 142).

Cessna 1569 Charley was on a ninety-day charter from Cordova Airlines to Morrison-Knudsen Co., Inc. The pilot was employed and paid by Cordova Airlines (R 79-80). See also the statement of counsel for the airline (R 126-127). The Morrison-Knudsen Co. did, of course, request the pilot to transport dynamite, but the final decision to fly the plane in violation of regulations was made by the Cordova Airlines pilot (R 243-247) who had been similarly engaged in flying dynamite on the previous day, although the president of the airlines denied he had knowledge of this activity until sometime after the crash (R 89). Cordova Airlines, Inc., an Alaska corporation, is a certificated airline (R 159). Surely the corporation is bound by the knowledge and voluntary act of the pilot it chose and paid to be in charge of its aircraft. Certainly the trial judge thought so (R 377). The dynamite being carried with the knowledge and consent of the airline, the question remains as to whether the aircraft was being used for an unlawful purpose. That the carriage of dynamite violated CAB regulations has been demonstrated under points II. and III., supra.

Section 622(h) of Title 49 USC provides:

> "* * * any person * * * who causes the transportation in air commerce of, any shipment, baggage or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Civil Aeronautics Board * * * relating to the transportation, packing, marking, or description of explosives * * * shall, upon conviction thereof for each such offense, be subject to a fine of not more than

$1,000.00 or to imprisonment not exceeding one year * * *".

The construction of the phrase "unlawful purpose" in the policy was a matter for the court and not the jury (Wigmore on Evidence, 3rd Ed., Sec. 2555). The carriage of dynamite without a CAA waiver was admitted. There was nothing to submit to the jury, and a verdict should have been directed on this defense, as requested by defendants' motion therefor (R 48). The error was compounded when the court, by its instructions (specification of error number ten, R 359-360), asked the jury to decide what the phrase "unlawful purpose" meant when used in the policy (R 359). This instruction was the subject of a proper objection (R 327), and defendants called this instruction to the attention of the court again in connection with the motion for a new trial (R 68).

V. THE CONFLICTING INSTRUCTIONS ON THE NECESSITY FOR A CAUSAL CONNECTION BETWEEN BREACHES OF THE POLICY AND THE CRASH REQUIRE A NEW TRIAL ON THE ISSUE OF OVERLOADING.

By the instruction quoted in specification of error number 3 (R 357) the court correctly advised the jury that defendants *need not* prove that the carriage of dynamite or the overloading of the aircraft caused, or contributed to, or increased the likelihood of the crash. In the instructions quoted in specifications 1 and 2 (R 358, 362) the court informed the jury it *must find* such a causal connection in order to uphold

underwriters' affirmative defenses. Of course one will never know which of these hopelessly conflicting instructions were taken to heart by the jury, but the result of the conflict is to render the jury's verdict valueless insofar as the issue of overloading is concerned, because it is impossible to know whether the jury found the plane was *not* overloaded, or whether it found the plane *was* overloaded, but that underwriters had not proved a causal connection between the overloading and the crash. Either way, the verdict would have been for plaintiff.

There was substantial evidence from which the jury could have found the plane was overloaded, in violation of General Condition number 2 of the policy, which provides:

> "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C. A. A. Approved Operations Manual, and in accordance with operations authorized as set forth therein." (R 142.)

The overloading issue is quite complicated, and rests in large part upon the testimony of Mr. Albert N. Lindemuth. Mr. Lindemuth was qualified and accepted as an expert (R 204-206). The CAA approved operations manual for Cessna 1569 Charley (Defendants' Exhibit J) was shown to Mr. Lindemuth (R 206), who was also handed defendants' Exhibit I, a CAA Form 337 showing that Federal wheel-skis, Model AWB 2500 A, had been installed on the aircraft shortly before the crash (R 206-207). The witness was then able to testify that the maximum allow-

able gross weight of the plane as equipped with these ski-wheels was 2,550 pounds (R 207). The empty weight of the aircraft after the wheel-skis were installed was 1,649 pounds (R 210). The witness stated an additional 13 pounds should be added to the empty weight by reason of the galvanized iron placed on the bottom of the skis, making an empty weight of 1,675 pounds (R 210-211). By subtracting the empty weight of 1,675 pounds from the maximum allowable gross weight of 2,550 pounds, the witness arrived at a maximum allowable useful load of 875 pounds for the aircraft (R 211). The witness testified that the "empty weight" of the aircraft does not include usable gasoline, oil, the weight of the pilot, or cargo (R 212). The plane normally carried 10 quarts of oil, weighing 19 pounds, and the standard figure for the weight of the pilot is 170 pounds. The plane had a capacity of 60 gallons of gasoline (5 unuseable gallons being included in the empty weight) (R 212). The witness was then handed defendants' Exhibit K, the pilot's log for the day preceding the crash, which indicates the plane was gassed up by the addition of 35 gallons at the close of operations on December 17 (R 213-214). Defendants' Exhibit K also indicated that the plane made two trips on December 17 covering the same ground as the fatal trip of December 18, and that 35 gallons of gas were consumed by the two trips (R 214). By assuming that the fatal trip took the same time as similar trips the preceding day, and that the same gasoline consumption of 12 gallons per hour was maintained, the witness was able to estimate the gasoline on board at the time of the crash as being

37 gallons (R 214). The parties had stipulated that the gasoline weighed 6 pounds per gallon (R. 154), which gave a figure of 222 pounds for gasoline on board at the time of the crash (R 214). The witness was then asked to assume that 16 cases of dynamite were also on board, weighing 53 pounds each, or a total of 848 pounds (R 215). The 53 pound weight of each case of dynamite was duly established (R 155, 259). The witness then gave a total figure for oil, the pilot, gasoline on board, and the dynamite, of 1,259 pounds, as contrasted with the useful load limit of 875 pounds, making the aircraft 384 pounds overloaded (R 215). The fact that 16 boxes of dynamite were on board at the time of the crash is based upon the testimony of Edwin E. Evans, the site superintendent for Morrison-Knudsen Co., that he examined the scene of the crash and found the remains of 16 dynamite boxes (R 253, 266-273). That the plane would hold 16 cases of dynamite was also established by the testimony of Mr. Evans, who helped the pilot unload 16 boxes of dynamite from the same plane on a trip made the previous day (R 246).

Plaintiff, on the other hand, produced a somewhat interested witness, Mr. Graham Mauer, Chief Pilot for Cordova Airlines, who testified that he examined the scene of the crash and was able to find the remains of only 8 dynamite cartons (R 293-294, 303). Thus a nice question of credibility of witnesses was presented for the jury. Did they believe Mr. Evans' count of 16 boxes, or Mr. Mauer's count of 8? No one will ever know, because one cannot say that the

jury was not also looking for a causal connection between the overloading and the crash, in accordance with the court's erroneous instruction (R 358).

Thus, it is submitted, appellants are entitled to a new trial on the defense of overloading, although a new trial will of course be unnecessary if appellants prevail on either of the two defenses arising from the undisputed fact the plane was carrying dynamite without a special CAA waiver and without the consent of underwriters.

VI. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY TO CONSTRUE "AMBIGUITIES IN THE POLICY" AGAINST THE UNDERWRITERS.

Specification of Error number 4 concerns the open invitation given the jury to construe the policy against the underwriters, without pointing out any ambiguities to be construed, and in spite of the fact that construction of the written policy was a matter for the court (R 356) (Wigmore on Evidence, 3rd Ed., Sec. 2555). This instruction was formulated by the trial judge himself, who thought counsel for both sides had overlooked something (R 339). Even if it were true, as he said, that the learned judge is mystified by insurance policies in general, still these delicate questions of the legal interpretation of the words of the policy cannot properly be entrusted to twelve laymen who are, after all, the triers only of disputed questions of fact.

Accordingly one cannot remain uncritical of the position taken by the court, that:

3. The new United States District Court for the District of Alaska having succeeded to the Federal jurisdiction formerly exercised by the Territorial Court, by virtue of Sections 13 through 18 of the Alaska Enabling Act (72 Stat. 339), and this being an action brought by an Alaska corporation against various British and Canadian underwriters, where the amount in controversy exceeds $10,000.00, the cause should be remanded, as necessary, to the new United States District Court, to which all pending federal cases will undoubtedly have been transferred by the time this appeal is determined.

Dated, Anchorage, Alaska,
January 4, 1960.

Respectfully submitted,

EDGAR PAUL BOYKO,
ARTHUR D. TALBOT,
By ARTHUR D. TALBOT,
Attorneys for Appellants.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

ORDER NO. S-712

United States of America, Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 2nd day of December, 1955

In the matter of the petition of Department of the Air Force for authority to deviate from certain provisions of Part 49 of the Civil Air Regulations.

ORDER GRANTING REQUEST FOR AUTHORITY TO DEVIATE FROM CERTAIN PROVISIONS OF PART 49 OF THE CIVIL AIR REGULATIONS

1. By letter dated November 2, 1955, the Chief, Traffic Division, D/Transportation, Office, Deputy Chief of Staff, Materiel, Department of the Air Force (Air Force), requested the Board to authorize the transportation of certain Class A explosives in civil aircraft to certain civilian and military airport terminals.

2. The Board has been advised by the Air Force that: Shipments of such explosives will be restricted

solely to charter or contract aircraft, obtained for the exclusive purpose of transporting shipments classified as Class A explosives in Part 72 of the Interstate Commerce Commission Regulations; loading at origin and unloading at destination will be accomplished by trained personnel thoroughly familiar with necessary safeguards required in the handling of these shipments; containers specifically designed for, and which afford extreme protection against shipping hazards will be used; shipments will be entrusted to the crew of the aircraft, who will be thoroughly briefed on the characteristics and proper handling of the cargo, and will move under a hand-to-hand signature service furnished by the carrier. In addition, the Board has been advised that shipments will follow a regular route pattern, originating at Tucson, Arizona, and shipped to Air Defense Command Bases throughout the United States, some of which are located at municipal airports. Further, a grant of authority to make immediate and expeditious shipment of the Class A explosives in civil aircraft is considered by the Air Force to be needed in the interest of National Defense.

3. Under the provisions of Sections 49.41 and 49.81 of Part 49 of the Civil Air Regulations, no explosive or dangerous article listed in Part 72 of the ICC Regulations as a Class A explosive . . . shall be carried on aircraft. Section 49.71 of Part 49, however, authorizes the Administrator, in emergency situations or where other forms of transportation are impracticable, to permit deviations from any of the

provisions of this part for a particular flight, where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo. Since the authority requested by the Air Force in this matter is not for a particular flight, but for a series of flights, the Administrator is not authorized to grant the special authority requested; however, it is apparent that the reasons existing to grant special authority in critical situations for a particular flight would be as compelling where a series of flights was intended, so long as the same critical situation existed in each of the flights intended. Therefore, it would be consistent with the special authority provisions of Section 49.71 to authorize the Air Force to deviate from the provisions of Part 49, as requested.

4. To support the Board's grounds for granting special authority to carry explosives in emergency situations or where other forms of transportation are impracticable, reference is made to Section 49.41 of Part 49 which permits transportation in cargo aircraft of any article packed, marked, and labeled in accordance with ICC Regulations for transportation by rail express. Under Section 71.13 of the ICC Regulations, shipment of explosives may be made upon request of the Departments of the Army, Navy, and Air Force of the United States Government after compliance with certain handling and packing regulations.

5. The Board notes that the Interstate Commerce Commission, pursuant to Section 71.13 of its regula-

tions, has authorized the various United States military departments to transport Class A explosives, by rail, whenever critical situations dictated such authorization. In these situations, however, the ICC has required that certain stringent packing, stowing, and carriage provisions of their regulations be complied with as a condition of such authorization. In addition, it is noted that a number of air carriers were authorized to carry, in recent years during national emergency status, Class A explosives in civil aircraft where it was found necessary in the National Defense.

6. The Air Force has indicated that the shipments intended will be shipped to Air Defense Command Bases throughout the United States, some of which are located at civil airports. In order to give due consideration to the proprietary interests of local airport management where a civil airport is a terminal point, an agreement between the Air Force and the local management should be made, and procedures established, acceptable to the Administrator, for the shipment of Class A explosives to such airport. Since all reasonable safety precautions will be observed in transporting such cargo, and because the movement is in the interest of National Defense, it is expected that civil airport management will enter into such agreement.

7. In the interest of safety, the Air Force will be required to certify that each shipment, by air, of the certain security-classified Class A explosives is in accordance with corresponding provisions of the Interstate Commerce Commission for shipment of ex-

plosives by rail, with respect to packing, marking, stowing, and securing of cargo.

In consideration of the foregoing, the Board finds that an authorization, as more specifically set forth hereinafter, permitting the Air Force to deviate from certain provisions of Part 49 of the Civil Air Regulations would not adversely affect safety and is in the interest of the public and is vital to the National Defense. Therefore,

It Is Ordered:

That contrary provisions of Part 49 of the Civil Air Regulations notwithstanding and subject to the conditions hereinafter set forth, the request of the Department of the Air Force be and it is hereby granted to the extent necessary to transport certain security-classified Class A explosives in civil aircraft to certain military and civil airports in the United States, provided that:

a. Shipments of such explosives by civil aircraft be restricted to charter or contract aircraft obtained for the exclusive purpose of transporting such explosives;

b. Each shipment be loaded and unloaded, packed, marked, stowed, and secured aboard the aircraft in accordance with corresponding rules or special instructions of the ICC for the rail express shipment of Class A explosives, and the Department of the Air Force so certifies;

c. Shipments be entrusted to the crew of the aircraft, who shall be thoroughly briefed on the char-

acteristics and proper handling of the cargo and they move under a hand-to-hand signature service furnished by the carrier;

d. Shipments may be made to any military airport in the United States;

e. Civil aircraft to be used in this operation shall meet the aircraft performance and weight limitations applicable to passenger-carrying aircraft.

f. Shipments may be made at any joint military-civil or civil airport in the United States if a prior agreement for its use has been reached between the Department of the Air Force and local civil airport management, and if procedures and operating instructions, approved by the Administrator, including, but not limited to, notification to the control tower prior to take-off or landing of the general nature of the cargo aboard, and airport weather minimums have been established between the parties.

This order and the authorization granted herein shall expire June 1, 1956, unless sooner superseded or rescinded by the Board.

(Sec. 205 (a), 52 Stat. 984, 49 U.S.C. 425 (a). Interpret or apply sec. 601, 52 Stat. 1007, as amended, 49 U.S.C. 551; sec. 902 (h) 52 Stat. 1015, as amended, 49 U.S.C. 622.)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan

(Seal) Secretary.

Appendix B

TABLE OF EXHIBITS

Exhibit	Identified	Offered	Received or Rejected
P-1 Insurance policy A-12732-178	47, 110	110	received 110
P-2 Civil Air Reg. 49.3(b)	312-313	314	received 314
D-A CAB regulations S-712 and SR-417	138, 139	139	received 140
D-B Letter to CAB	166	166	received 168
D-C Poppas letter to M-K contracting and claims section	169-171	166	rejected 189 withdrawn 225
D-D 9 photos	168, 173	168 250	rejected 189 received 251
D-E map of Big Mt. area	168, 174	168	received 174
D-F CAB computation sheet	168	168	rejected 189
D-G OS&D Report	192-194	195	received 196
D-H 4 flight reports	196-198	198	rejected 199 received 307 for limited purpose
D-I Maintenance form 337	200-202	202	received 202
D-J Manual for Cessna 1569-C	206	206	received 206
D-K Pilot's log, December 17	213	213	received 213

No. 16,283

IN THE

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

STANLEY J. McCUTCHEON,
315 Fourth Avenue, Anchorage, Alaska,
Attorney for Appellee.

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No. 16,283

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Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

This action was commenced in the U. S. District Court for the Territory of Alaska on June 21, 1956.

Judgement for the plaintiff-appellee was entered by that court on June 12, 1958. Notice of Appeal was filed on July 17, 1958.

Jurisdiction of this appeal in this court is conferred by 48 U.S.C. 1291, 1292 and 1294.

STATEMENT OF THE CASE.

The plaintiff-appellee, Cordova Airlines, Inc. was a small intra-Alaska air carrier, with about 10 airplanes. It was certificated by the Civil Aeronautics Board for routes between Anchorage and Valdez, Cordova, Seward and 14 other stops in Prince William Sound and in the Copper River Valley (Tr-159). The President of the Airline was Merle K. Smith, a pilot of many years experience, who, in 20 years as President-pilot had built the airline from a name and two airplanes to the status of a highly respected carrier (Tr-159).

President Smith had procured insurance to cover his small mortgaged fleet from Coffey-Simpson, Inc., an Anchorage broker, which represented Farwest General Agency of Seattle. Farwest in turn placed the insurance with the Underwriters at Lloyds of London and Eagle Star Insurance Company, Ltd., Orion Insurance Company, Ltd. and Victoria Insurance Company, Ltd., the latter three being Canadian Underwriters (Tr-162).

The back page of the policy which issued is reproduced at page 142 of the transcript and was admitted as Ex-A at the trial (Tr-153).

Construction of the applicability of certain "General Exclusions" and "General Conditions" contained on this back page is the very essence of this appeal. Appellee contended at the trial, and still contends, that the Underwriters are asking the courts to treat the "General Conditions" in the policy exactly as though they were "General Exclusions" and, as to

one defense, to ignore a governing provision of General Exclusion No. 1 and treat it exactly the same as General Exclusions 2 through 6.

The back page of the policy first sets out "Section 1 — Loss or Damage to Aircraft", and contains the general insuring clause applicable in this case which reads (Tr-142, Ex-A):

> "A. The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, . . . , from whatever cause arising except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown . . ."

Section 2, dealing with third party liability follows and has no application in this case.

The Definitions follow Section 2 and define "Civil Aeronautics Authority", "Flight Risk," "Ground Risk" and "Passenger" and have no applicability, nor lend any assistance in the construction problem involved in this case.

The "General Exclusions" follow. There are six. All of them are governed by an unnumbered, undesignated phrase reading:

"This Certificate and/or Policy does not cover:"

General Exclusion No. 1 is further modified by a phrase governing sub-sections (a) (b) and (c) which reads:

"1. Any loss, damage or liability arising from:"

The "General Conditions" are last. These 10 provisions cover various matters such as requiring that the

plane have an airworthiness certificate, be operated in accordance with its CAA operations manual, that the assured use due diligence, give immediate notice of claims, etc. (Tr-142).

Shortly prior to December 18, 1955 Cordova Airlines had entered into an airplane charter contract with Morrison-Knudsen Company, Inc. for a 90 day period. For the duration of the contract Cordova was to furnish a Cessna 180 airplane and pilot to the construction site superintendent of Morrison-Knudsen Co. The pilot and plane were to be entirely at the disposal of Morrison-Knudsen Co. and to do whatever flying the superintendent directed in connection with the construction by them of roads and buildings at Big Mountain, near Lake Iliamna, Alaska. Morrison-Knudsen was a subcontractor for this purpose to Western Electric Co. which had a contract with the U. S. Air Force to construct a Distant Early Warning radar station on the top of remote Big Mountain (Tr-279). Big Mountain was located on the south shore of Lake Iliamna which was down Cook Inlet and southwest of Anchorage (Tr-234).

A provision in the contract between Western Electric and the U. S. Air Force provided that all supplies and materials acquired by the contractor or sub-contractors became the property of the U. S. Air Force immediately upon acquisition. (Tr-155).

The plane furnished by Cordova was Cessna 180 N-1569C and the pilot was Herbert N. Haley. It is agreed that the plane was covered by the insurance policy here involved for $16,000, less $800.00 deduc-

tible, subject to the defenses raised by the Underwriters (Tr-153). The pilot was a veteran Alaska bush pilot, had been with Cordova since 1942 and had over 12,000 hours of logged time in the air (Tr-161).

On December 18, 1955 the pilot, acting pursuant to orders from Morrison-Knudsen's superintendent, took off from the Big Mountain air strip which belonged to the U. S. Air Force (Tr-298) and flew to Iliamna Bay, located on the shore of Cook Inlet, and there loaded a number of cartons of dynamite into the airplane and took off for Big Mountain (Tr-234). The dynamite had been previously delivered to Iliamna Bay by Morrison-Knudsen but belonged to the U. S. Air Force (Tr-155).

While making an approach to land on the Big Mountain air strip the plane, for some unknown reason, crashed into the side of the mountain. It came to rest about 300 feet from the point of initial impact. The pilot was killed. There were no passengers.

The dynamite did not explode but was scattered from a point 50 ft. beyond the point of initial impact to a point 75 ft. beyond the resting place of the airplane and from 75 ft. to 100 ft. on each side of the path of the plane (Tr-292-295).

Neither the President nor Chief Pilot of Cordova knew the pilot was hauling dynamite at the time (Tr-92, 289, 293). But according to President Smith of Cordova, it wouldn't have made any difference anyway as far as CAB Regulations were concerned because CAB Order S-712 contained a blanket exemption to carry dynamite under the circumstances for

the U. S. Air Force. Smith had been advised by his Washington Counsel when the CAB Order came out and had been advised by Mr. Tibbs, a CAA inspector in Anchorage, that the order contained blanket authority to haul dynamite for the Air Force (Tr-319-320).

The airplane was a total loss (Tr-153).

The Underwriters denied liability on the grounds that the policy did not apply because the airplane was carrying dynamite and was overloaded. There was no claim that the dynamite had anything to do with the crash or that it increased the amount of the loss. The policy nowhere mentions dynamite or explosives or anything similar. The defense was based on the claim that under CAB regulations a waiver was required to carry dynamite that no specific waiver was obtained, or the consent of Insurer and this was a violation of General Exclusion 1(c). Nor was it claimed the alleged overload caused the crash. Underwriters claimed that overloading was a violation of General Condition No. 2 and the mere fact that it occurred, if it did, was enough to relieve them of liability. Underwriters also claimed that since the flight was being conducted without a CAA waiver, the violation of a CAB Regulation made the whole purpose of the flight unlawful, which was a violation of General Exclusion No. 4 and relieved them of liabiilty.

Graham Mower, Chief Pilot for Cordova Airlines, Inc., flew to the scene of the crash the morning after its occurrence. He was qualified as an all 'round experienced Alaskan bush pilot familiar with the area

of the crash, with over 300 hours logged time in Cessna 180 airplanes. The court nevertheless would not permit him to explain his theory of the cause of the crash arrived at after personal investigation, over Underwriters' objection (Tr-299-300).

Conflicting testimony was received on the overloading defense, CAB Order S-712 was received in evidence as well as CAR SR-417 which followed it in time and the jury was instructed on all aspects of Underwriters' defenses. The verdict was for the plaintiff Cordova in the amount of $15,200.00.

The case was tried by the Hon. Harry C. Westover, visiting U. S. District Judge from Los Angeles. Judge J. L. McCarrey, Jr. had disqualified himself on motion of counsel for Underwriters because of having once represented Cordova.

SUMMARY OF ARGUMENT.

I.

While there was a slight inconsistency in the court's instructions on the defense of overloading, the Underwriters were not prejudiced. It was Cordova that was prejudiced by the repeated instructions of the court to the effect that the Underwriters need not show any causal connection between an overload and the crash in order to find against Cordova on this defense. Cordova contends that the only correct portion of the court's instructions on this defense was the part objected to by the Underwriters, which indicated there should be some causal connection shown.

Cordova's stand is based on the ground that General Condition No. 2 of the policy, relied on for this defense, should not be construed as an *exclusion.* There are General Exclusions in the policy, but this defense is not based on one of them, it is based on a General Condition.

Appellant combines its argument on this defense with its argument on the defense that a waiver had not been obtained from CAA to carry dynamite (Specifications 1 and 2). This is wrong and confusing. The overloading defense is based on a General Condition (No. 2) and the waiver defense is based on General Exclusion 1(c). The construction of exclusions does not govern the construction of conditions. The authorities cited by Underwriters apply only to the construction of *exclusions* in policies worded entirely different from the policy here involved.

II.

Appellant's argument that dynamite was carried in violation of General Exclusion 1(c) of the policy, because no waiver was obtained from CAA, ignores the governing phrase of the exclusion, "Any loss, damage or liability arising from:". Appellant even fails to include this phrase when purporting to quote the entire exclusion in its brief.

The words "Any loss . . . arising from:" have a definite intended meaning. They are not to be ignored in construing the policy.

The trial court's instructions to the effect that the loss must have been found to "arise from" the alleged breach were correct.

It is submitted that no person can confidently say that a reading of the CAB Regulations and ICC Regulations on the transportation of explosives makes it clear that a waiver was required to carry dynamite under the facts of this case.

Even if a waiver was required, CAB Order S-712 provided blanket exemption.

III.

The airplane was not being used for an "unlawful purpose", in violation of General Exclusion No. 4, even if it is assumed to have been violating a CAB regulation at the time.

The "purpose" of the flight was to supply dynamite for the construction of a Distant Early Warning radar station and was entirely lawful. Even if a CAB regulation had been violated, this would be only incidental to a perfectly lawful, legitimate purpose.

The court's instructions were more helpful to Underwriters under the facts of this case than they had a right to expect.

IV.

There were ambiguities in the policy. Cordova and Underwriters differed on the construction of General Exclusion 1(c), the meaning of the phrase "unlawful purpose" and the difference between General Exclusions and General Conditions. If these provisions could convey different meanings to the parties, they could easily have seemed ambiguous to the jury after a long trial.

This court itself found an almost identical policy highly ambiguous in the *Eagle Star* cases, 196 F. 2d 317 rehearing granted 201 F. 2d 764.

The court's instructions on ambiguity were correct.

ARGUMENT.

Each of appellant's points of argument will be considered in the order presented in its brief.

I. APPELLANT ENTITLES PART I OF ITS ARGUMENT ON PAGE 15 OF ITS BRIEF AS FOLLOWS:

"Underwriters Need Not Show That Breaches of the Conditions and Exclusions of the Policy Resulted in the Crash."

Appellant's sixth affirmative defense alleged, among other things, that the aircraft was overloaded at the time of its destruction, that this was a violation of a general condition of the policy of insurance and done without the knowledge or consent of underwriters (Tr-31).

Considerable and conflicting evidence was introduced by both sides as to the overloading aspect and the jury found for the appellee.

In Specification of Error No. 1 (p-7 Brief) appellant quotes what it considers an objectionable portion of the court's instructions on overloading. Appellant contends that this particular portion, of all the court's instructions on the defense of overloading or exceeding the operations limitations of the plane, is erroneous law, because it was not required to show

any causal connection between the overloading, if it happened, and the crash in order to avoid liability. The mere fact of overloading alone is enough to relieve them of liability, they contend.

Appellee concedes this might be a reasonable contention *if* the Underwriters had listed operating outside operations limitations as an *exclusion* in the policy, but they did not do this.

The defense is based on what the policy labels General Condition (2) (Tr-142) which is set out in fine print on the back page of the policy in the following form:

"General Conditions

1. . . .

2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with operations authorized as set forth therein."

There are 10 such General Conditions. No mention is made in the policy of the effect of a breach of the General Conditions.

Section 1, entitled, "Loss or Damage to Aircraft", at the top of the same page contains the general insuring clause. Sec. "A" provides that insurers will make good a loss of the aircraft ". . . from whatever cause arising *except* frost; wear and tear . . ." etc. (Emphasis added).

Farther down on the same page (Tr-142) appear the "General Exclusions" which provide that "This Certificate and/or Policy does not cover:", thereafter listing the exclusions.

The fine print therefore contains a general insuring clause under Section 1, making certain *exceptions* for which Underwriters will not pay or make good the loss, and certain General Exclusions, which the policy *does not cover* and, finally, certain General Conditions, with no explanation or definition as to the effect of a breach of No. (2) on which underwriters rely for this defense.

Certainly if the underwriters had intended that operating the airplane in violation of its Operations Limitations was to be an *exception* to the loss coverage, or, that the policy exclude or *not cover* such a flight, they would have so stated under Section 1 or under the General Exclusions. Instead it has been covered as an admonition or general condition.

The only question is, what are the *conditions* attached to a violation? If a violation was meant to *void* the policy, they would have so stated as they actually did do in General Condition No. 9. If a violation of General Condition No. 2 was to have the effect of relieving underwriters from liability, they could have so stated as they did do under General Condition No. 7.

If the General Conditions are, as appears to be the case, merely a collection of "catch-all" provisions, how should a trial court instruct a jury when a violation is relied on as a defense?

The court's instructions on this defense are quoted below in their entirety commencing at Tr-357.

> "You are instructed that the defendants have asserted three defenses, which are based upon

provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of evidence. *Your verdict must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.* (emphasis furnished)

"The defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the weight permitted in the Operations Limitations as estabIsihed by the Civil Aeronautics Authority and was therefore in violation of paragraph 2 of the General Conditions contained in the policy of insurance which reads as follows:

'2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA approved Operations Manual and in accordance with operations authorized as set forth therein.'

"The defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

"In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all of the evidence presented by both plaintiff and defendants to determine whether the defendants have proved by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. *If you find that the defendants have not proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limits you must find for the plaintiff and against the defendants on this defense.* (emphasis furnished)

"If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense." (Tr-357-358).

Later, commencing on page 364 of the transcript the court further instructed the jury on the overloading aspect as follows:

"One of the defenses which the defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or CAA approved Operations Manual

and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulation. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next determine whether or not the aircraft was laden in excess of its legal limits. *If you find that at the time it crashed the aircraft was overloaded, in violation of its operations limitations or CAA approved Operations Manual, then your verdict must be for the defendants and against the plaintiff on this issue.*" (emphasis furnished)

The contention of plaintiff Cordova Airlines, Inc. had been that in order to defeat a recovery on the defense of overloading the Underwriters would have to prove that the plane was overloaded and that the overload was the cause of the accident.

The policy itself was no help in trying to determine the intent of the Underwriters when General Condition No. 2 was inserted. All that could definitely be determined was that the provision was not intended to be an *exception* under Section 1 or a General Exclusion because it was not listed under these categories.

Actually, the court instructed the jury *three times* to the effect that the Underwriters did not have to prove that the overloading, assuming there was overloading, caused or contributed to the crash in order to find for the defendant. (See italicized portions of above quoted instructions).

The very last words to the jury on the subject of overloading were that if they found that the airplane was overloaded, their verdict should be for the defendants.

The court did not send the instructions to the jury room with the jurors (Tr-368-369).

Appellant contends that the last portion of the above quoted instruction on overloading, ending on Tr. 357-358 entitles it to a new trial. It is admitted that the paragraph objected to is not entirely reconcilable with the instructions as a whole. This was pointed out to the court by counsel for Cordova (Tr-336). This, even though it did rightly express plaintiff's view of the law governing the point. It was obvious from the instructions as a whole that the court had not adopted plaintiff's view of the law and any slight inconsistency could be used for the very purpose it is being used—that of claiming a new trial with the resulting delay and hardship on the insured.

The court felt however that the words "by the preponderance of the evidence" eliminated any inconsistency (Tr-336).

In any event, the instructions, as a whole were *overwhelmingly* to the effect that Underwriters need not show that overloading caused or contributed to the crash in order to defeat recovery. If they found the plane was overloaded, plaintiff lost the case.

It is obvious, however, that the portion of the instructions objected to could only prejudice Underwriters *if* the jury first found that the plane was

overloaded and then went on to decide whether or not the overload had caused the accident. This is not likely to have happened at all. The instructions were almost entirely devoted to the theme that if an overload was proven, plaintiff could not recover. The conclusion is almost unavoidable—the jury found there was not an overload and its deliberations ended there.

As stated before, it was and still is, Cordova's contention that since the condition relied on was not included within the exceptions to the insuring clause or among the General Exclusions, recovery could not be defeated unless it was proven that there was an overload and that the overload was the cause of the loss.

Underwriters rely on *Bruce v. Lumbermen's Mutual Casualty Co.,* 222 F. 2d 642 to support its contention that no causal connection need be shown between the breach of an exclusion clause and the accident.

In the first place, we are not here concerned with an alleged breach of an *exclusion clause* as to the overloading aspect. The defense was based on an alleged breach of a *general condition,* which was not otherwise defined by the policy. There were exclusion clauses in the policy in issue, but the alleged breach was not included amongst them.

The *Bruce* case covered an entirely different phase of aviation law. The suit was based on public liability provisions where liability under a given policy could run from $1.00 to the upper limit, usually high. The policy in the case at bar was simple hull coverage for $15,200 to protect Cordova's mortgagee.

In the *Bruce* case the court described the policy as follows:

> "An exclusion in the policy 'provided in effect that the policy should *not apply*' (d) to liability with respect to bodily injury or damage caused by the operation of the aircraft with the knowledge of the named insured; (1) if used for any unlawful purpose, or during flight or attempt thereat, in violation of any government regulation for civil aviation" (emphasis added).

It is plain enough that the alleged breach was under an *exclusion* clause wherein it was stated that the policy would *not apply*. The holding is not at all controlling or applicable here.

In *Travelers Protective Association of America v. Prinsen,* 291 U.S. 576, 78 L.Ed. 999, cited in the *Bruce* case, the insurance policy specifically *excluded* liability for death of a person which occurred in the transportation of explosives. Again, public liability; again, a specific *exclusion clause* for death occurring while explosives were being hauled.

Underwriters cite *Des Marais v. Thomas,* N.Y., 1955, 147 N.Y.S. 2d 223. Here, *General Exclusion* 1(b) was in question in a public liability suit for death. The discussion is by the "Supreme Court Special Term, N.Y. County, Part III". No judgment was rendered. The discussion by the court did not apply to the facts involved here. Apparently the only thing accomplished was to grant a partial summary judgment on a point of law unrelated to this case and grant plaintiff additional time to plead in answer to

interrogatories. The case is not authority for anything.

Also cited by appellant is *Globe Indemnity Company v. Hansen,* 231 F. 2d 895. The insurance policy provided that it "does not apply . . . to any insured:

> (b) Who violates or permits the violation of any governmental regulations for civil aviation applying to aerobatics, instrument flying. . . ." (emphasis added).

The court said "The *exclusion is based on contract,* which excludes the risk without regard to causal connection" (emphasis supplied). Citing the *Bruce* and *Travelers* cases as authority. Again public liability and a definite exclusion clause.

The last case cited by Underwriters was *Lineas Aereas Columbianas Expresas v. Traveler's Fire Insurance Co.,* 257 F. 2d 150. The policy expressly provided that it would not apply unless certain standards were maintained. The crash and loss of 37 lives occurred, the court found, while the plane was in violation of about every standard imaginable, and with the knowledge and consent of the insured, except as to one. A specific *exclusion clause* was relied on.

It is obvious the foregoing authorities are based on exclusion clauses which provide that the policy shall not apply to the particular situation or risk.

The Underwriters could have so provided. The policy here under study had exclusion clauses which provided that the policy did not apply to the situations

named. Exceeding the operations limitations was not so listed. It was merely listed as a condition.

Since the foregoing authorities hold that violation of the particular specific exclusion clauses alone, without a showing of causal connection, is enough to suspend the policy, they must be accepted on that basis. Such a rule is based on the strict letter of the contract, as was pointed out in the *Globe Indemnity* case. It can result in what might seem to be harsh law in some instances. The whole purpose of the contract of insurance was to protect the insured *if* he sustained a loss. After the loss, insurer is relieved by a fortuitous circumstance even though the violation had nothing whatever to do with causing the loss.

But just as the cases cited by Underwriters are authority for construing the exclusion strictly as written, they are likewise authority for not construing a provision as an exclusion *when it is not stated as such.* Underwriters, it appears, would like to eat their cake and have it too—or insist on the pound of flesh from whatever region they designate. They are asking the courts to apply the strict and sometimes harsh rule of law on exclusions to what is admittedly separately stated in the contract to be a condition. As far as Underwriters are concerned, every provision in the policy is an exclusion—after the loss. This is not fair to the average insured. Even one skilled in interpreting policies of insurance and familiar with the law on exclusions couldn't know that the actual courtroom attitude of Underwriters would be that all breaches are exclusions.

And, just as the foregoing cases are authority that no causal connection need be shown on violation of an exclusion clause, they are likewise authority that causal connection *must* be shown if the alleged violation is not stated to be an exclusion.

The foregoing argument assumes a breach. Actually, in this case the question of whether or not the plane was overloaded was put to the jury on instructions loaded in favor of Underwriters' contention that the condition was an exclusion and the jury found in favor of Cordova.

More is written on this point under Part V of this Argument.

II. PART II OF APPELLANT'S ARGUMENT, COMMENCING ON PAGE 19 OF ITS BRIEF IS ENTITLED:

"Dynamite Was Carried in Violation of Exclusions in the Policy."

The words "dynamite" or "explosives" or anything similar are not mentioned anywhere in the policy involved in this case. However, almost two years after the suit had been filed, and the day before trial, the Underwriters were permitted to file additional affirmative defenses which included this defense (Tr-45).

The defense is based on a subdivision of one of the General Exclusions in the policy and appellant's reasoning is that under the applicable regulations of the CAB explosives or dangerous articles could not be transported, even in cargo planes, without special authority from the CAB in the form of a waiver; that ICC Regulations, which governed the definition of the type explosives meant by CAB, made an Explosive

"A" a "prohibited article". Since no special waiver was obtained or the "express written consent of Farwest General Agency for Insurers" obtained, the flight violated General Exclusion 1(c). It was not contended by Underwriters that the dynamite aboard caused or contributed to the loss of the airplane and it was stipulated that the dynamite did not explode when the crash occurred.

This technical defense is based on a complicated interpretation of CAB and ICC Regulations and then related to the waiver requirement of the policy. To follow appellant's reasoning through, one must first examine Sec. 49.0 of CAB Regulations, 14 C.F.R. Part 49 at Page 276. This section is entitled, "Applicability of Part" and says that explosives or other dangerous articles, listing a number of such materials, *but not dynamite,* shall not be transported by air, "except as provided in this part."

Eighty-one sub-sections later in the part, Sec. 49.81 (14 C.F.R. Page 285) entitled, "Prohibited Articles" states:

> "No explosive or dangerous article listed in the I.C.C. Regulations (49 C.F.R. Part 72) as an Explosive A, a Poison A, a forbidden article, or as an article not acceptable for rail express (see Sec. 49.62 for authorization of the carriage of certain radioactive materials) nor any article listed in Appendix A shall be carried on aircraft subject to the provisions of this part."

Appendix A is printed in full immediately following the above subsection and is entitled,

"Appendix A — Items Prohibited From Transportation By Air"

Explosives

. . . . . ."

Thirty-four items are listed *but not* dynamite nor anything similar. Appendix B, immediately following Appendix A, obviously *does permit "all Class B Explosives"* to be carried on aircraft not carrying passengers.

Appellant, however, reasons directly from Sec. 49.81 to the ICC Regulations to support its theory. 49 C.F.R. Sec. 72.5 is entitled, "List of Explosives and Other Dangerous Articles", and there follows 23-1/2 pages of fine print, listing various articles with abbreviated classifications and other data. "Dynamite" is not listed except to refer the searcher to "High Explosives" of the same list. Only two "High Explosives" are listed. One is apparently liquid. Both are listed as "Expl. A" but dynamite again is not mentioned. The reader is referred to Sections 73.61 to 73.87. Section 73.61 on page 65 is entitled, "High Explosives" and reads in part:

> "(a) High explosives (dynamite), *except gelatin dynamite* when offered for transportation by rail freight or highway must not contain in excess of 60 per cent of *liquid explosive* ingredient and when offered for transportation by carrier by water . . . ." (emphasis furnished).

Appellant's reasoning omits consideration of Sec. 73.61 however and reverts again to the CAB Regulations, 14 C.F.R. Sec. 49.71, page 283 which provides in part:

> "(a) Deviations from any of the provisions of this part for a particular flight may be authorized by the Administrator where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of *persons and cargo.*" (emphasis added).

Appellant does not cite Sec. 49.41, 14 C.F.R. page 281 which reads:

> "Articles which may be Carried in Cargo Aircraft
>
> "In addition to the articles acceptable for the transportation on aircraft carrying passengers, any article acceptable for and packed, marked, and labeled in accordance with the ICC Regulations (49 C.F.R. Parts 71-78) for transportation by rail express may be carried in cargo aircraft: Provided that no article listed in Appendix A of this part shall be carried except under the provisions of Sec. 49.71 . . ."

Again it is noted that dynamite, or any item similar to dynamite, is not mentioned in Appendix A.

With the above sections in mind, the Underwriters' reasoning in skipping from Sec. 49.0 to 49.81, then to a portion of the ICC Regulations and finally back to Sec. 49.71 is in the open. It has completely ignored the fact that dynamite is not at all covered in Appendix A, that Sec. 49.41 comes the closest to applying to cargo aircraft such as the one lost in the case at bar, that Sec. 49.71 properly applies to carriage of prohibited articles with persons and cargo.

Underwriters expect the court to assume that the dynamite in this case was not gelatin dynamite or that it contained in excess of 60% of liquid explosive

ingredient, and that it actually was a Class A explosive when the evidence before the court cannot sustain such an assumption. The ICC Regulations involved were written for rail express, rail freight, highway and water carriage. They are not intelligible when applied to air carriage and the CAB Regulations.

The complicated basis for this last minute defense was confusing at the time of trial. The tortured nature of the reasoning was not as apparent then as it is at the present time.

In any event, after arriving at the conlusion that a waiver should have been obtained from CAA to make the flight in question, or written permission from the Underwriters, appellants claimed a violation of General Exclusion 1(c) of the policy.

On page 19 of its brief appellant purports to quote this exclusion verbatim. Apparently through oversight it neglected to quote the controlling portion upon which the court based its instructions. In omitting to quote all of the exclusion clause appellant's brief is entirely without meaning on this particular point.

The exclusion relied on is set up in the policy as follows (Tr-142, Ex-A):

"GENERAL EXCLUSIONS"

This Certificate and/or Policy does not cover:

1. *Any loss, damage or liability arising from:*

(a) ...

(b) ...

(c) ... or any flying in which a waiver issued by the Civil Aeronautics Authority is required

unless with the express written consent of Farwest General Agency for Insurers" (emphasis supplied).

It is obvious from examining Exhibit A that appellant omitted to include the governing phrase of Section 1 consisting of the words, "Any loss, damage or liability *arising from:*" (emphasis furnished).

When the omitted section is considered in connection with the waiver requirement the meaning of the court's instruction which is contained in part on page 362 of the transcript explaining to the jury that the actual loss of the airplane must have been found to have "arose from" or be "the result of" the failure of the plaintiff to obtain a written waiver are thoroughly understandable.

It is presumed that the Underwriters meant what they said when they devised the format of their own policy. The obvious plain everyday meaning of the wording would be taken to be that the policy would not cover any loss during any flying in which a waiver was required if the loss was one "arising from" failure to procure the waiver. What other meaning could have been intended by the use of the phrase? "Arising from" means "growing out of", "the result of" in ordinary usage. Appellant completely ignores the governing words of paragraph (1) of the General Exclusions in its argument. It never has contended that failure to procure a waiver, in and of itself, caused the loss, nor that the fact that there was dynamite aboard had anything to do with the crash.

If the Underwriters had intended that the policy not cover any flying done without a waiver, they would have omitted the words "(1) Any loss, damage or liability arising from:" from the policy. Then the overall governing words:

"This Certificate and/or Policy does not cover:" would then have achieved the result they now contend for.

A look at the policy (Tr-142) immediately reveals that the beginning words "This Certificate and/or Policy does not cover:" applies to *all six* exclusions. But as to exclusions (1)(a), (b) and (c) only, the exclusion is *obviously* and *purposely* modified to loss or damage "Arising from" violation of those exclusions. To give the exclusion the interpretation advanced by the Underwriters would render subsection 1(a), for example, totally meaningless. The mere fact that the U. S. might be at war somewhere, or that a riot existed somewhere, would exclude a loss coverage, even though war or riot had nothing whatever to do with the reason for the loss. It is obvious the Underwriters meant to exclude a loss "arising from" war, riots, etc. and "arising from", as used, could only mean a loss "caused by" or the "result of".

Cordova's argument was that even if a waiver could be construed to be required for a flight by a chartered cargo plane from one remote spot in Alaska to another under the circumstances existing, a blanket exemption from such requirement existed in the form of CAB Order S-712. This order was introduced in evidence and is printed as Appendix A to appellant's brief.

The instructions given by the court on this defense were as follows:

> "You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is, that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all of the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur" (Tr-357).
>
> . . . . . .
>
> "The defendants contend, among other defenses, that the flight in question—that for the flight in question, the plaintiff failed to obtain a waiver as required by Civil Air Regulations Part 49

and also failed to obtain written permission from the Farwest General Agency to make the flight in question.

"The policy of insurance reads as follows insofar as applicable to this defense:

" 'This Certificate and/or Policy does not cover:

'1. Any loss, damage or liability arising from: . . .

. . . . . .

'(c) . . . or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers.'

"In this connection the plaintiff contends that Civil Aeronautics Board Order S-712, which has been introduced in evidence as defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3, the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from Civil Aeronautics Authority.

"In this connection you are instructed that the Civil Aeronautics Act defines 'United States' as:

'United States means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof.'

"The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite

belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

"If you believe that defendants' Exhibit A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

"If you believe that the defendants' Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1(c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from and was the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

"If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants on this issue."

The defense now being discussed was one of the "three defenses" referred to at the beginning of the court's instructions. It is immediately obvious that

Cordova's case as to this defense was prejudiced when the court said:

> "You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur" (Tr-357 and above quotes).

The above quoted portion is directly contrary to the latter part of the instruction which adopted plaintiff's interpretation of the meaning of the phrase "arising from". It is contended that the latter portion adopts a correct view of the law and that plaintiff's case was prejudiced by the earlier statement.

III. PART III OF APPELLANT'S BRIEF, COMMENCING ON PAGE 23 IS ENTITLED:

> **"Civil Aeronautics Board Order S-712 Is Not Applicable to Cordova Airlines."**

Appellant states on page 24 of its brief that:

> "There is no evidence linking Cordova Airlines with Order S-712".

The court's attention is invited to the order itself, printed as Appendix A to appellant's brief and to the testimony of Merle K. Smith, President of Cordova Airlines, Inc., commencing on page 317 of the transcript to the effect that Mr. Tibbs, an Anchorage,

Alaska inspector for Civil Aeronautics Authority, assigned to inspect the operations of Cordova had advised Smith that blanket authority existed for Cordova to carry explosives for the Air Force. And to page 319 of the transcript where the same witness refers to the order of December 2, 1955 as constituting blanket authority to haul dynamite, that the airlines' counsel in Washington D. C. had wired and told Cordova that such an order was coming out. And to page 319 where it was testified that Mr. Tibbs of the CAA was still stationed in Anchorage, although attending a CAA school in Oklahoma at the time of the trial.

Appellant relies greatly on the preamble to Order S-712 in arguing that it was not applicable. It is submitted that the trial judge was correct in stating on page 328 of the transcript:

> "The Court. I'm sorry, but it's the Order that counts and not the preamble that goes before, so I will overrule your objection."

Comparing the actual order, following preamble paragraph 7, with the testimony at the trial it is known that the aircraft in question was on charter to Morrison-Knudsen, a sub-contractor to the U. S. Air Force as prime contractor, that the plane was being used as a cargo plane only, at the time of the crash, that the movement of the dynamite was to an airport owned by the U. S. Air Force, that where the word, "United States" is used in the order it included Alaska under the Civil Aeronautics Act.

There is no claim by the Underwriters that the loading and securing of the dynamite in the aircraft was

not in compliance, nor that the pilot was not briefed on handling explosives. The provision of the order concerning flying out of civil airports obviously was not applicable to a flight from an uninhabited bay on Cook Inlet where the lone pilot landed, did his own loading, took off and was approaching to land on a mountain air field located five miles from a remote construction site.

The order had been interpreted by a CAA official as constituting blanket exemption, Cordova Airlines considered it to give blanket exemption, CAB never charged Cordova with a violation of any of its regulations in connection with this flight (Tr-318).

It is submitted that the trial court could and should have granted a summary judgment as to the defense of Underwriters based on this order. Submitting the question to the jury was all to the Underwriters' advantage.

All this is aside from the fact that, as a cargo plane, operating under the circumstances of this case, probably no *waiver* or *blanket exemption* was required to haul the dynamite.

This court's attention is again invited to the matter mentioned under II of this argument—Sec. 49.41, 14 C.F.R. at page 281, entitled "Articles Which May Be Carried In Cargo Aircraft" provides that *any article* that could be carried by rail express under ICC Regulations, can be carried in cargo aircraft without a waiver, unless it is an item mentioned in Appendix A. And that Appendix A *does not list dynamite.* If, con-

ceivably, an article could not be carried by rail express, yet was not listed in Appendix A so as to require a waiver, then what rule governs? The completely confusing tie-in between CAB Regulations and ICC Regulations results in "dead end" searches in this area.

Appellant argues on page 24 of its brief that Cordova did not claim retroactive benefit from CAB Order SR-417 (21 F.R. 3776) which was also admitted into evidence (Tr-140). This order is printed as Appendix A to this brief.

The court will note that this order deals specifically with the Alaska situation, brought to a head by Underwriters' refusal to pay the claim in this case on the ground that dynamite was being carried. The order recites the factual situation existing, the fact that the "White Alice" projects were behind schedule, and grants specific authority to certain air carriers authorized by Morrison-Knudsen Co., Inc. to carry explosives. Cordova Airlines Inc. is named as being one of such carriers. The requirements of the order are almost *exactly the same* as those of Order S-712 and the order is timed to take effect just two days before Order S-712 expires.

The issue of whether or not Order S-712 applied was put to the jury. The Underwriters should not complain.

IV. PART IV OF APPELLANT'S ARGUMENT ON PAGE 25 OF ITS BRIEF IS ENTITLED:

"The Aircraft Was Being Used for an Unlawful Purpose."

This argument is based on the premise that carrying dynamite on the flights in question without a waiver was in fact a breach of CAB Regulations. That point has been argued under Section II of this argument.

What appellant means is that *if* the carriage of dynamite without a waiver was a violation of the regulations, then the flight was being conducted for an "unlawful purpose" and a violation of a General Exclusion of the policy, *if* it was done with the knowledge and consent of assured.

As a further reinforcement of its argument that the flight was being conducted for an unlawful purpose the Underwriters rely on 49 U.S.C. 622(h) which provides for a criminal penalty upon conviction of violation.

Appellant purports to quote the pertinent part of this section on page 25 of its brief. It is submitted that appellant has again by oversight omitted important and governing portions.

Section 622 is entitled, "Criminal Penalties" and reads in part:

> "(h)(1) Any person who knowingly delivers or causes to be delivered to an air carrier or to the operator of any civil aircraft for transportation in air commerce, or who causes the transportation in air commerce of, any shipment, baggage, or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Civil Aeronautics Board, under

> subchapter VI of this chapter, relating to the transportation, packing, marking or description of explosives or other dangerous articles shall, upon conviction thereof for each such offense, be subject to a fine of not more than $1,000, or to imprisonment not exceeding one year . . ."

If the actual wording is compared it is obvious that the word "knowingly" was omitted.

In any case, whether or not the pilot of the aircraft in this case violated a safety regulation was put to the jury who found that he had not.

The above quoted section does not appear applicable to the case or to the exclusion relied on. It is believed to have been cited to the Trial Judge to show that it is a criminal offense to violate a safety regulation, thereby somehow emphasizing the claim that the aircraft was being used for an "unlawful purpose".

The format of the policy containing General Exclusion 4, relied on by appellant for this defense, is as follows (Tr-142, Ex-A):

> "General Exclusions
>
> This Certificate and/or Policy does not cover:
>
> 1. . . .
>
> 2. . . .
>
> 3. . . .
>
> 4. . . .; the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured;"

The Underwriters' contention, in effect, is that if the pilot violated a regulation during the flight in

question, then the whole purpose of the flight itself became unlawful.

It is undisputed that the flight was being made to bring dynamite to use in the construction of a Distant Early Warning radar station on a remote mountain. The result of such a flight would be to further the national defense effort. The reason for making the flight was not claimed to be unlawful by the Underwriters.

If the object of, effect of, reason for, or purpose of the flight was lawful, then it is submitted that it can not be argued with any force at all that the airplane was being used for an unlawful purpose.

Assuming, without admitting, that a CAB regulation was violated during the flight—this would have nothing to do with the *purpose* of the flight. In such case, the violation would be merely *incidental* to the use of the airplane for a perfectly legitimate, lawful ultimate purpose. To hold contra would permit any type flight to become a flight for an "unlawful purpose", if the pilot at any time committed any infraction of CAB regulations. It is submitted that the Underwriters had in mind uses of the plane for smuggling, counterfeiting, etc. where the entire reason for a flight was for the purpose of committing an unlawful act, and where the act was committed "with the *knowledge and consent of the Insured.*"

The exclusion not only requires that the purpose of the flight be unlawful; it must have happened with the knowledge and consent of the Insured.

The undisputed testimony was that the airplane belonged to Cordova Airlines and was under charter to Morrison-Knudsen Co., Inc. for 90 days. Although Cordova furnished and paid the pilot, both pilot and plane were located in the bush country for the period of the charter and completely at the disposal of Morrison-Knudsen Co., Inc.

The President of Cordova Airlines testified that he did not know the plane was being used to carry dynamite on the day in question (Tr-289, 99). The pilot was at the disposal of Morrison-Knudsen Co., Inc. and took flying orders from them.

The court fully instructed the jury on the defense of "unlawful purpose", whether the flight was made with the knowledge and consent of Cordova and even on the "criminal penalty" aspect as requested by Underwriters. The court's instructions are quoted below:

> "You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now I want to stop there and emphasize 'preponderance of the evidence'. Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict must be in favor of the defendants and against the

plaintiff if you find by a preponderance of the evidence, having in mind all of the instructions given you by the court, that the defendants have established all or any one of these three defenses. You are instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft—that is to say, that defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur." (Tr-357)

. . . . . .

"One of the defenses asserted by the defendants in this case is that, at the time it crashed, Cordova Airlines' aircraft N-1569-C was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives then you must further determine whether or not any explosives so carried consisted of dynamite. If you determine that the plane was carrying dynamite then you must determine whether a waiver was secured by the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, providing you find that a waiver was necessary. If you find that the aircraft was carrying dynamite and no such waiver had been secured and find also that a waiver was necessary from the Civil Aeronautics Authority then you are instructed that the carrying of dynamite was unlawful. Dynamite is clas-

sified by the applicable government regulations as a Class A explosive, and the transportation of dynamite was, accordingly, prohibited by such regulations, unless a waiver was secured from the Civil Aeronautics Authority, unless such waiver had been waived. By Act of Congress, it is a criminal offense for any person to knowingly deliver or caused to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce or for any person to cause the transportation in air commerce of, any shipment of property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

"The knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question is a question of fact for you to determine. Ordinarily, the knowledge and consent of an agent is attributable to and is legally binding upon the principal." (Tr-362-364.)

. . . . . .

"Further reference is made to the defense asserted that Cordova Airline aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of aircraft shall knowingly accept explosives for carriage by air unless the shipper or authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with the Civil Aeronautics Board regulations governing

the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority for the flight upon which this aircraft was destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955 was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the defendants and against the plaintiff on this issue without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the airplane was destroyed (Tr-364-365).

Again considering the instructions to the jury on the unlawful purpose aspect the court said:

"The defendants contend, among other defenses, that paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:

> 'This Certificate and/or policy does not cover the use of the aircraft *or* any unlawful purpose if with the knowledge and consent of the assured.'

"This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

"In this connection you are instructed the word 'purpose' is defined as 'the object; effect, or result, aimed at, intended, or attained.'

"You are instructed that the meaning of the word, 'use' is defined as: 'the purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved'.

"You are also instructed that the policy of insurance here involved in paragraph 8 reads as follows:

> 'Purposes for which aircraft will be used: private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.'

"If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense." (Tr. 358-360.)

It is submitted that the instructions given were, on the whole, prejudicial to Cordova's case where they

touched on the "Criminal Penalty" statute. Even if a regulation had been violated, that fact had no bearing on whether the purpose of the flight was unlawful. The same reasoning applies to the court's instruction on the certificate of compliance aspect (Tr-364-365). Even if no certificate of compliance was used, this had nothing to do with ultimate purpose.

Where the instructions touched on "unlawful purpose" and "knowledge and consent", it is submitted that they were absolutely correct.

As to the Certificate of Compliance aspect of this defense see the testimony of Mr. Bud S. Seltenreich, Chief Air Carrier Safety Maintenance Branch, CAA, Anchorage, called by Cordova. On page 312 as to Civil Air Regulation Section 49.3(b), concerning air carrier's certificates, he "wasn't certain" on the witness stand whether an amendment he had discussed that morning with Cordova's counsel applied or not. On page 313 he again "didn't know" the answers to questions that had been previously discussed with him in his office by the counsel attempting to get him to repeat his answers on the witness stand.

V. THIS SECTION OF APPELLANT'S ARGUMENT COMMENCING ON PAGE 27 OF ITS BRIEF IS ENTITLED:

"The Conflicting Instructions on the Necessity for a Causal Connection Between Breaches of the Policy and the Crash Require a New Trial on the Issue of Overloading."

Appellant reconsiders the matter of conflicting instructions already covered in Part I of its argument,

with a review of some of the evidence on the loading of the airplane and concludes with a plea for a new trial.

On page 27 of its brief appellant states:

> "In the instructions quoted in specifications 1 and 2 (R358,362) the court informed the jury it *must find* such a causal connection in order to uphold Underwriter's affirmative defenses."

What appellant has done is to combine Specifications of Error 1 and 2 for argument even though they are based on different provisions of the policy and separate instructions.

Specification 1 concerns the overloading aspect and is based on General Condition No. 2 in the policy. Specification 2 concerns flying without a waiver and is based on General Exclusion 1(c) and the applicability of the words "any loss . . . arising from:" Appellant then cites cases such as *Bruce v. Lumbermen's Mutual and Casualty Co.,* 222 F. 2d 642 and *Globe Indemnity v. Hansen,* 231 F. 2d 895, in support of *both* specifications. Appellant then refers to both alleged errors merely as involving "breaches of the policy provisions." (Page 8 appellant's brief).

Such an approach to an analysis of the legal problems raised is superficial and specious, and leads one to wonder if the Underwriters are basically unaware that there is a difference between "General Exclusions" and "General Conditions."

The instructions on flying without a waiver are based on the only General Exclusion in the policy

raised as a defense, which is specifically modified by the words "any loss . . . arising from". (See General Exclusion 1(c) Tr-142). While the *Bruce* and *Globe* cases are also based on exclusions, the courts were not attempting to construe them as modified by the words "arising from". In addition, as pointed out in Part I of this argument, those cases involved public liability and specific exclusion provisions where, as in *Travelers Protective Ass'n. of America v. Prisen,* 291 U.S. 576, 78 L. Ed. 999 (which apparently established the doctrine) the policy specifically excluded liability for death of a person which occurred in the transportation of explosives. Therefore, the cases cited and their legal doctrine are not authority to construe the General Exclusion now before this court.

The Underwriters wrote their own General Exclusions. They saw fit to modify the first exclusion by the words "any loss . . . arising from." They must be bound by a layman's interpretation of their own wording.

And the cases mentioned are of even less assistance in construing the General Condition of the policy relied on in the defense of overloading.

Whether or not the plane was overloaded was properly a question for the jury. There was evidence both ways. The fact that there might have been 16 cartons of dynamite aboard was based on the testimony of Underwriters' witness Edwin E. Evans, a former site superintendent (Tr-253). On the other hand, Evans' testimony was very probably discounted by the jury because he was so positive on direct and so

obviously weak on cross examination. He denied telling Mr. Clark, a CAB investigator, that the best he "could see was approximately 8 cartons in the area of the accident." (Tr-267). On his testimony, enlarged photos of the scene of the crash were introduced (Tr-251 Defendant's Exhibit D) which were supposed to show about 16 cardboard cartons in the area of the crash. This might have indicated an overload. On cross examination he admitted that the best he could see was 8 or 9 box tops. It was brought out that each box or carton consisted of *two* identical parts. The witness Graham Mower testified that Mr. Clark of CAB had asked Mr. Evans how many cases of dynamite the pilot had aboard and that Mr. Evans said, "I don't know." (Tr-295-296).

The jury undoubtedly found that the Underwriters had failed to prove an overload on the airplane.

The Underwriters complain that the jury might have found that the plane was overloaded, but that the overload was not the cause of the accident, if they had remembered and been guided by the one conflicting portion of the court's instruction mentioned in detail under Part I of this argument.

The probability that the jury did this is quite unlikely. As pointed out in Part I the Trial Court instructed the jury no less than three times that if an overload was proven, they should find for the Underwriters and that the Underwriters need not prove that the overload caused or contributed to the crash to prevail on this defense. The instructions were read

or paraphrased to the jury in court and were not taken to the jury room.

On the other hand, Cordova's contention was and still is that the one sentence of apparent conflict in the mass of instructions that were otherwise all to the Underwriters' benefit, was the *only* sentence that stated the correct legal perspective as to General Condition No. 2.

The Underwriters wanted this condition treated exactly like an *exclusion* and this is just what the Trial Court did. If it had been intended to have the summary final effect of an exclusion, it would have been listed under General Exclusions and the governing phrase, "This Certificate . . . does not cover:" any operation outside the plane's Operations Limitations or CAA Approved Operations Manual, etc.

Instead, the provision was placed down in the "catch-all" portion of the fine print. Suppose the plane had crashed while in violation of some very minor requirement in the CAA Operations Manual, such as keeping the certificates posted in full view in the pilot's compartment? Would the Underwriters be permitted to avoid liability on the basis that this was a breach of a general condition of the policy. Not likely, unless it could somehow be shown that this breach *caused* the crash. The assumption would be that if they had wanted to exclude *any* flight in which *any* violation of the Operations Manual occurred, they would have said so by moving the provisions here involved two paragraphs up and under General Exclusions.

The logical interpretation of the intended effect of the General Conditions in this policy is that they are conditions to be observed by the insured. If not observed and a loss results *by reason thereof* the Underwriters are absolved of liability.

The court said in *Globe Indemnity Co. v. Hansen,* 231 F. 2d 895, 897:

> "The exclusion is based on *contract,* which excludes this risk without regard to causal connection." (Emphasis supplied)

and in *Bruce v. Lumbermen's Mutual,* 222 F. 2d 642:

> "An insurer need not show a causal connection between the breach of an *exclusion* clause and the accident, *if the terms of the policy are clear and unambiguous.*"

and in *Travelers Protective Ass'n of America v. Prinsen,* 291 U.S. 576, 78 L. Ed. 999:

> "Courts of high authority have held that in *policies so phrased* there is no need of any causal nexus between the injury or death and the forbidden forms of conduct."

Conversely, if the *contract* does not *clearly and unambiguously* treat the alleged breach as an exclusion, then it would be thoroughly unjust to construe it as such.

Underwriters would like a new trial. Payment of any claim has already been delayed over four years. An additional four years works a hardship only on Cordova Airlines, not the Underwriters.

It is submitted that the Underwriters received instructions favorable to them far beyond that war-

ranted by their contract and that a new trial is not justified.

VI. APPELLANT'S PART VI OF ITS ARGUMENT ON PAGES 31 AND 32 IS ENTITLED:

"It Was Error for the Court to Instruct the Jury to Construe 'Ambiguities in the Policy' Against the Underwriters."

Appellant contended there was no ambiguity in the disputed provisions of the policy. In response to a question by the Court if there was not ambiguity, counsel for Underwriters replied:

> "Mr. Talbot. None, whatever, and we rely on three of the most plain, simple, ordinary English sentences ever constructed by an insurance company, and . . ." (Tr-340).

Even after the Trial Judge had pointed out to counsel that the parties differed diametrically on the meaning of the phrase "Any loss, damage or liability arising from . . ." and the phrase, ". . . In which a waiver issued by the Civil Aeronautics Authority is required . . ." and that a dispute existed as to the difference between a General Exclusion and a General Condition, Underwriters' counsel steadfastly contended that, ". . . there's nothing there to construe. There's no ambiguity to resolve." (Tr-340-343).

And counsel for Cordova was of the same opinion as to his own interpretation of the phrases and the policy in general.

The court left the matter of construction to the jury with a batch of instructions based on highly

technical defenses affording the Underwriters every opportunity to win the case if only one juror had seriously adopted just one of the great variety of defenses advanced.

As to the instruction on ambiguity, even counsel for Underwriters agreed "It's perfectly good law, of course . . ." but still contended no ambiguity existed to which to apply it (Tr-340).

The very same policy came before this court in 1952 in *United States et al. v. Eagle Star Ins. Co. Limited, et al.,* No. 13,122, 196 F. 2d 317. Judges Healy, Bone and Pope applied the law of Washington State as to the ambigious nature of General Condition No. 3.

On rehearing of the same case in 1953, 201 F. 2d 764, Judges Healy and Bone concurred to reverse the judgment below. Judge Pope dissented on the ground that no ambiguity existed.

At the trial of this case Cordova likewise relied on General Condition No. 3 which now reads:

> "3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid *any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy.*" (Emphasis added).

Apparently the Underwriters have changed the wording of the policy to insert the italicized words above, since the Ninth Circuit Court considered the same condition in the *Eagle Star* cases cited above.

The wording of General Condition (3) in the *Eagle Star* cases was:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid or diminish any loss of or damage to the property hereby insured and in the event of the aircraft sustaining damage covered by this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories." See 201 F. 2d 765 HN-1."

In Headnote 2 on page 766 the court decided the condition required that the insured use reasonable care to avoid or diminish loss or damage to the property in event of accident.

It is obvious that the court's construction of the meaning of General Condition No. 3 as it was written in the *Eagle Star* cases was not what the Underwriters had intended, because the wording has now been changed as italicized above so as to refer *directly to Section 1 of the policy* which is the *general insuring clause.*

As it now reads, the plain meaning of General Condition No. 3 is that Cordova should use reasonable care to avoid any loss or damage to the aircraft. See Section 1 and General Condition No. 3 of the policy here in dispute (Tr-142).

Conversely, if the insured had used reasonable care to avoid any loss or damage, then Underwriters would "pay for . . . loss of the aircraft . . . from whatever cause arising . . ." as guaranteed in Section 1. This is not an unreasonable construction and it is the

protection most business men *think* they are getting when they buy insurance. A small certificated airline such as Cordova, with its equipment mortgaged to keep modern, has a right to expect that in return for heavy insurance premiums, it will not be refused payment for a loss on technicalities and far-fetched construction of safety requirements where it had not failed to exercise reasonable care at all times.

Underwriters have not alleged that Cordova failed to use reasonable care to avoid this loss. As far as the accident is concerned, the cargo aboard might as well have been pig iron or cabbage.

The present wording of General Condition No. 3 and its specific reference to Section 1, as well as the *Eagle Star* holdings were drawn to the Trial Judge's attention and an instruction requested. Apparently the Trial Judge analyzed no further than the wording of headnote 2 on page 766 of 201 F. 2d and held that "due diligence" had nothing to do with the case (Tr-323).

In any event, as to a policy of one of these same defendants, very similar to the one in issue, Judge Healy said:

> "Had the insurance company deliberately set out to achieve obfuscation it could hardly have done a better job than was accomplished here." (201 F. 2d at 766, first column).

CONCLUSION.

In construing the policy here involved the definite separation of the "exceptions", "general exclusions" and "general conditions" by the Underwriters in the format must be observed. They were not all intended to be interpreted the same.

The strict rule of contract law requiring no causal connection between violation of an exclusion and the loss can not be applied to general conditions. To do so would work a gross deception on the insured.

The instructions to the jury on overloading were overwhelmingly to the advantage of the Underwriters because they repeatedly advised the jury that no causal connection between violation of a general condition and the loss need be shown by Underwriters. This was incorrect law. The only correct part of the instructions on overloading is the portion objected to by Underwriters.

The jury verdict in favor of Cordova should not be disturbed.

The intricate, complicated reasoning advanced by Underwriters to show that Cordova should have had a specific waiver for the flight in question is not supported by the regulations on analysis. There was no proof that the dynamite here involved was an "Explosive A", or that it was anything other than a gelatin dynamite and excepted; it was not included in Appendix A. In short, Underwriters' proof on this technical defense reaches a "dead end" short of any certainty, just as a search and study of *all* the regula-

tions that might be applicable produces nothing but organized confusion on the subject. But even if a waiver were required, CAB Order S-712 provided a blanket exemption. SR-417, which followed it in time, removes any shadow of a doubt. Its requirements are exactly the same. And the policy itself requires that the loss have been one "arising from" such flying in order to relieve Underwriters from liability.

The judgment of the Trial Court should be affirmed.

Dated, Anchorage, Alaska,
February 25, 1960.

Respectfully submitted,
STANLEY J. MCCUTCHEON,
Attorney for Appellee.

(Appendix A Follows.)

Appendix A

Appendix A

Affects Part: 49 Regulation No. SR-417
Distribution: General

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Effective: May 28, 1956
Adopted: May 28, 1956

SPECIAL CIVIL AIR REGULATION

AUTHORITY TO DEVIATE FROM CERTAIN PROVISIONS OF PART 49 OF THE CIVIL AIR REGULATIONS WITHIN THE TERRITORY OF ALASKA

By letter dated March 26, 1956, Morrison-Knudsen Company, Inc., contractors and engineers, Boise, Idaho, requested the Board to permit certain operators, notwithstanding the provisions of Part 49 of the Civil Air Regulations, to transport Class A explosives and other dangerous articles in civil aircraft, within the territory of Alaska, which are necessary to complete certain urgent construction work being accomplished by this company in the interest of National Defense.

The Civil Aeronautics Administration has notified the Board that certain contractors other than Morrison-Knudsen are involved in the same construction work as the Morrison-Knudsen Company in connection with the "White Alice" military defense contract

and require similar authority to transport Class A explosives.

The Board has been advised by Morrison-Knudsen that these materials are essential in their construction work as a subcontractor to Western Electric Company, who, in turn, has a contract with the United States Air Force for important classified installation work throughout Alaska, and that all explosives or other dangerous articles will be shipped in accordance with Interstate Commerce Commission (ICC) packing and handling requirements. A listing of aircraft that are assigned under contract to the project concerned, together with the name of the contractor, base station, and area of operation was appended to Morrison-Knudsen's letter of March 26. The request for authority is to apply initially to the operators listed therein. Morrrison-Knudsen proposed to notify the Board when additional aircraft are put under contract to engage in the same work.

The Board has been further advised by Morrison-Knudsen that such shipment of explosives and other dangerous articles will be restricted to aircraft operating exclusively in Alaska and in connection with a military defense project identified as AF-33 (600-29717) and known as ALCOM or White Alice Project.

Under the provisions of §§ 49.41 and 49.81 of Part 49 of the Civil Air Regulations, no explosive or dangerous article listed in Part 72 of the ICC Regulations as a Class A explosive . . . shall be carried on aircraft. Section 49.71, however, authorizes the Administrator, in emergency situations or where other forms of

transportation are impracticable, to permit deviations from any of the provisions of this part for a particular flight where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo. Since the authority requested by Morrison-Knudsen in this matter is not for a particular flight but for a series of flights, the Administrator is not authorized to grant the special authority requested.

To support the Board's grounds for granting special authority to carry explosives in emergency situations or where other forms of transportation are impracticable, reference is made to §49.41 which permits transportation in cargo aircraft of any article packed, marked, and labeled in accordance with ICC Regulations for transportation by rail express. Under Section 71.13 of the ICC Regulations, shipment of explosives may be made upon request of the Departments of the Army, Navy, and Air Force of the United States Government after compliance with certain handling and packing regulations.

The Board notes that the ICC, pursuant to Section 71.13 of its regulations, has authorized the various United States military departments to transport Class A explosives, by rail, whenever critical situations dictated such authorization. In these situations, however, the ICC has required that certain stringent packing, stowing, and carriage provisions of its regulations be complied with as a condition of such authorization. In addition, it is noted that a number of air carriers were authorized to carry, in recent years during na-

tional emergency status, Class A explosives in civil aircraft where it was found necessary in the National Defense.

In a letter dated April 5, 1956, from cognizant authority in the Department of the Air Force, it is stated that the work under contract to Morrison-Knudsen "is behind schedule and the cargo involved is necessary for the completion of a major program which is in the interest of National Defense," and it is requested that deviation authority for the air carriers listed in Morrison-Knudsen's letter be granted for a period of not less than one year. The Board regards this justification as particularly compelling. Moreover, in view of the remoteness of the area to which these commodities are to be transported and the improbability of creating a hazard involving persons on the ground, the carriage of such commodities by air does not appear to affect the public interest adversely.

The provisions of this special regulation authorize deviations from Part 49 only with respect to the carriage of Class A explosives and the shipper and operator shall comply with the requirements of Part 49 in all other respects.

Prior to engaging in operations pursuant to this special regulation, each operator will be required to give notice to the Administrator of the type and registration number of the aircraft and the airports and other landing areas to be used.

Except for Class A explosives, the articles included in the list appended to Morrison-Knudsen's letter of

March 26 are not prohibited by Part 49 of the Civil Air Regulations for cargo-carrying aircraft. Therefore, the authorization contained herein is limited to Class A explosives.

Since this Special Civil Air Regulation authorizes the transporting of Class A explosives in a remote area and does not appear to affect the safety of the public adversely, and because the Board has been advised by the Department of the Air Force that the White Alice Project is behind schedule and the cargo involved is necessary in the interest of National Defense, the Board finds that omission of notice and public procedure is not contrary to public interest and that good cause exists for making this regulation effective on less than 30 days' notice.

In consideration of the foregoing, the Civil Aeronautics Board hereby makes and promulgates the following Special Civil Air Regulation effective May 28, 1956:

1. Contrary provisions of Part 49 of the Civil Air Regulations notwithstanding, and subject to conditions hereinafter set forth, the operators listed in Appendix "A" and any other operator authorized by the Administrator to be added to such list pursuant to this Regulation, may deviate from those provisions of Part 49 which prohibit the carriage of Class A explosives in aircraft, to the extent necessary to transport Class A explosives in civil aircraft to and from certain areas within Alaska as listed in Appendix "A", provided that:

a. Shipment of such explosives, by civil aircraft, shall be made only by operators authorized by Morrison-Knudsen Company, Inc., or other contractors acting under a military defense project known as ALCOM, DEWLINE, or White Alice and identified as contract AF-33 (600-29717);

b. Each operator shall furnish the Administrator, prior to carriage of such explosives, with a list showing the type aircraft, registration number, and area in which the aircraft is to be operated, and no deviation from this listing shall be made without the express approval of the Administrator;

c. Each shipper and operator shall comply with all pertinent provisions of Part 49 and the ICC Regulations including packing, marking, labeling, and loading requirements and with any special instructions issued by the ICC for the handling of Class A explosives;

d. The crew of the aircraft shall be thoroughly briefed on the characteristics and proper handling of the cargo;

e. Shipments may be made to and from a civil airport only if prior arangements have been made between the operator of the aircraft and local civil airport management;

f. The operations on and in the vicinity of civil airports shall be conducted in accordance with such special traffic rules as may be prescribed by the Administrator including weather minimums, airport approach and departure routes to avoid flight over

congested areas, and notification to the airport control tower of the nature of the cargo aboard;

g. The aircraft shall not be used to carry persons other than crew members and shall be operated in accordance with the aircraft performance and weight limitations applicable to passenger-carrying aircraft unless otherwise authorized by the Administrator; and

h. Single-engine aircraft shall be operated in accordance with operation specifications approved by the Administrator.

2. That, upon notification by Morrison-Knudsen Company, Inc., or other *bona fide* contractors acting pursuant to the above-specified contract that certain other operators of aircraft have been put under contract to engage in the same work, the Administrator of Civil Aeronautics is authorized to add to the list in Appendix "A" any such operator who to him meets the requirements of this Special Civil Air Regulation.

This Special Civil Air Regulation shall expire June 1, 1957, unless sooner superseded or rescinded by the Board.

(Sec. 205 (a), 52 Stat. 984; 49 U.S.C. 425 (a). Interpret or apply sec. 601, 52 Stat. 1007, as amended; 49 U.S.C. 551; sec. 902 (h) 52 Stat. 1015, as amended; 49 U.S.C. 622)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan

Secretary

(Seal)

Appendix "A" to Special Civil Air Regulation No. SR-417

Operator	*Area*
Morrison-Knudsen Company, Inc. Dist.	All of Alaska Except So. Eastern Section
Cordova Airlines	All of Alaska Except So. Eastern Section
Safeway Airways	Upper Yukon, Kuskokwim, Bristol Bay, Iliamna
Safeway Airways	Seward Peninsula
Circle Air Trails	Bristol Bay and Iliamna Area
Alaska Sportsmen	Kuskokwim Bay Area Which Includes Bethel & Platinum
Bernard Blanchard	Galena, McCrath and Fairbanks Area
Foster Air Service	Seward Peninsula

No. 16283

United States
Court of Appeals
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska, Third Division

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-12-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BOYKO & TALBOT,
Turnagain Arms Bldg.,
Anchorage, Alaska;

EDGAR PAUL BOYKO,
4201 Wilshire Blvd.,
Los Angeles, California,

For Appellant.

BUELL A. NESBETT,
First Nat'l Bank Bldg.,
Anchorage, Alaska,

For Appellee.

In the District Court for the District of Alaska, Third Division

No. A—12349

CORDOVA AIRLINES, INC., and NATIONAL BANK OF ALASKA, a Corporation,

Plaintiffs,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, FARWEST GENERAL AGENCY AND COFFEY-SIMPSON AGENCY, INC.,

Defendants.

COMPLAINT

Plaintiffs complain of defendants and say:

First Cause of Action

I.

The plaintiffs are Alaska corporations and have complied with all Territorial conditions precedent to the commencement of this suit.

II.

That on October 24, 1955, the defendant, Farwest General Agency, hereinafter referred to as Farwest, as agent for the defendant insurer, Underwriters at Lloyd's of London, hereinafter referred to as Lloyd's, and as a partial insurer on its own behalf, through its agent, the defendant, Coffey-Simpson Agency, Inc., hereinafter referred

to as Coffey, issued its insurance certificate No. A-12732-178 to the plaintiff, Cordova Airlines, Inc., hereinafter referred to as Cordova, a copy of said certificate with endorsements, being attached hereto as Exhibit "A."

III.

That said insurance certificate, among other items of aircraft, insured a certain Cessna 180 airplane identified as Number N-1569-C, belonging to Cordova, against loss or damage in the maximum amount of Sixteen Thousand Dollars ($16,000.00).

IV.

That the plaintiff, National Bank of Alaska, was named as mortgagee in Endorsement No. 7 of the certificate of insurance with loss payable to it as its interest might appear, with respect to any loss or damage that might happen to Cessna 180 No. N-1569-C.

V.

That on or about December 18, 1955, and while the certificate of insurance was in full force and effect, the said Cessna 180, No. N-1569-C, was totally destroyed in an accident near Lake Iliamna, Alaska.

VI.

That the plaintiffs demanded payment of the sum of Sixteen Thousand Dollars ($16,000.00) due from the defendants Lloyd's and Farwest by reason of said loss, but these defendants have denied all liability under their certificate of insurance.

VII.

That the plaintiffs have complied with all conditions precedent to the commencement of this suit provided for in the certificate of insurance.

Second Alternative Cause of Action

I.

That the plaintiffs are Alaska corporations and have complied with all Territorial conditions precedent to the commencement of this suit and with all conditions precedent contained in the certificate of insurance hereinafter mentioned as Exhibit "A."

II.

That prior to October 24, 1954, the plaintiff, Cordova, issued invitations to various insurance firms in the Anchorage area to quote rates on aircraft insurance upon specified conditions and pursuant to said invitations received acceptable rate quotations from the defendant Coffey representing the defendant insurers, Farwest and Lloyd's.

III.

Accordingly and on October 24, 1954, Coffey, as agent for the insurers, Lloyd's and Farwest, caused to be issued to Cordova, insurance certificate No. A-12356-179, with endorsements, a copy of said certificate being attached hereto as Exhibit "B."

IV.

That said certificate of insurance, among other items of aircraft, insured a certain Cessna 180 air-

plane identified as N-1569-C, belonging to Cordova and mortgaged to National Bank of Alaska and the Reconstruction Finance Corporation, in that order of preference.

V.

That Endorsement No. 6 of said certificate contained a mortgage clause providing that any loss or damage paid under said certificate should be made to Reconstruction Finance Corporation as mortgagee, and that as to the interest of the mortgagee only, the insurance would not be invalidated by any act of neglect of the mortgagor or owners of the insured airplanes.

VI.

That Endorsement No. 7 of said certificate provided that loss or damage to Cessna 180, No. 1569-C, should be payable to the National Bank of Alaska, as its interest might appear, as separate mortgagee of this particular airplane.

VII.

That on March 1, 1955, and while the certificate of insurance (Exhibit "B") was in force, the mortgage held by Reconstruction Finance Corporation was paid in full by Cordova with monies obtained from the National Bank of Alaska and a new mortgage was executed by Cordova to the National Bank of Alaska, covering all items of aircraft owned by Cordova, including Cessna 180 No. N-1569-C.

VIII.

That on October 24, 1955, insurance certificate No. A-12356-179 (Exhibit "B") expired and was renewed by Certificate No. A-12732-178 (Exhibit "A") and that by mutual mistake of Cordova and the defendants, the renewal certificate (Exhibit "A"), contained a mortgage clause as Endorsement No. 6 identical to the mortgage clause in the renewed certificate (Exhibit "B") providing that loss or damage covered by the certificate be paid to Reconstruction Finance Corporation as mortgagee when as a matter of fact Cordova and the defendants all knew that Reconstruction Finance Corporation was no longer a mortgagee.

IX.

That when the renewal certificate of October 24, 1955, was issued (Exhibit "A") it was the intention of all of the parties hereto that Endorsement No. 6 thereto should read to provide that loss or damage covered by the certificate be paid to National Bank of Alaska instead of Reconstruction Finance Corporation and that as to the mortgagee, National Bank of Alaska, the insurance would not be invalidated by any act or neglect of the mortgagor or owners.

X.

That on or about December 8, 1955, and while the certificate of insurance (Exhibit "A") was in full force and effect, the said Cessna 180, No. N-1569-C, was totally destroyed in an accident near Lake Iliamna, Alaska.

XI.

That the plaintiffs demanded payment of the sum of Sixteen Thousand Dollars ($16,000.00) due from the defendants Lloyd's and Farwest by reason of said loss, but these defendants have denied all liability under their certificate of insurance.

Third Alternative Cause of Action

I.

Reallege and adopt Paargraphs I through XI of the Second Cause of Action.

II.

That prior to the issuance of the renewal certificate of October 24, 1955 (Exhibit "A"), the defendants, Coffey and Farwest, by reason of familiarity with Cordova's affairs were well aware that Reconstruction Finance Corporation was no longer a mortgagee and that the National Bank of Alaska had become the sole mortgagee of all of Cordova's insured aircraft and had been so informed by the plaintiffs.

III.

That the defendants, Coffey and Farwest, knowing the true financial realationship between Cordova and the National Bank of Alaska, nevertheless negligently issued the said renewal certificate (Exhibit "A") in form contrary to the plaintiff's insurance requirements and in such form as to deprive plaintiffs of the benefit of Endorsement No.

6 to their damage in the sum of Sixteen Thousand Dollars ($16,000.00).

Wherefore, plaintiffs pray for judgment as follows:

First Cause of Action

1. For judgment in favor of plaintiffs and against Lloyd's and Farwest in the sum of Sixteen Thousand Dollars ($16,000.00), less proper deductions to be determined by the Court, plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the court seems proper.

Second Alternative Cause of Action

1. In the event judgment is denied on the First Cause of Action, then a decree in favor of plaintiffs reforming the insurance contract to conform to the true intent of the parties and judgment for plaintiffs against Lloyd's and Farwest in the sum of Sixteen Thousand Dollars ($16,000.00), less proper deductions to be determined by the Court plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the Court seems proper.

Third Alternative Cause of Action

1. In the event judgment is denied on the first and second causes of action, then judgment against Farwest and Coffey in the sum of Sixteen Thou-

sand Dollars ($16,000.00) less proper deductions to be determined by the Court, plus costs and a reasonable sum for attorney's fees.

2. For such other and further relief as to the court seems proper.

Dated at Anchorage, Alaska, this 21st day of June, 1956.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

ANSWER

For their answer to the plaintiffs' complaint, defendants Underwriters at Lloyd's of London and D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency (sued herein as "Farwest General Agency") allege as follows:

First Alleged Cause of Action

I.

Answering Paragraph I, deny that plaintiff National Bank of Alaska is an Alaska corporation, and deny knowledge or information sufficient to form a belief as to the remainder of the allegations contained in said paragraph.

II.

Answering Paragraph II, admit that on or about October 24, 1955, defendant Farwest General Agency, as agent for defendant Underwriters at Lloyd's of London, issued said insurance certificate No. A-12732-178 to plaintiff Cordova Airlines, Inc., but specifically deny that defendant Coffey-Simpson Agency, Inc., at any time acted as agent for answering defendants and allege that defendant Coffey-Simpson Agency, Inc., at all times material herein acted solely as agent for plaintiffs; deny that Exhibit A annexed to the complaint is a true and correct copy of said certificate of insurance and, except as so specifically admitted or denied, deny the allegations contained in said paragraph.

III.

Answering Paragraph III, deny the allegations contained therein, and allege that the maximum insurance coverage afforded said Cessna 180 airplane No. N-1569-C was in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00), subject to all the terms and conditions of said certificate of insurance.

IV.

Answering Paragraph IV, admit that plaintiff National Bank of Alaska was named as mortgagee in endorsement No. 7 of the certificate of insurance, with loss payable to it as its interest might appear with respect to Cessna 180 No. N-1569-C, subject to the terms and conditions of the cer-

tificate of insurance but, except as so specifically admitted, deny the allegations contained therein.

V.

Answering Paragraph V, admit the allegations contained therein, except that it is denied that the aircraft mentioned was totally destroyed, there being some salvagable parts.

VI.

Answering Paragraph VI, admit demand and non-payment, but deny that any sum was or is due plaintiffs from answering defendants under the terms of the certificate of insurance.

VII.

Answering Paragraph VII, deny the allegations contained therein.

Second Alleged Alternative Cause of Action

I.

Answering Paragraph I, deny the allegations contained therein.

II.

Answering Paragraph II, deny that defendant Coffey represented answering defendants and deny knowledge or information sufficient to form a belief as to the remainder of the allegations contained therein.

III.

Answering Paragraph III, admit the issuance of certificate No. A-12356-179 but, except as so spe-

cifically admitted, deny the allegations contained therein.

IV.

Answering Paragraph IV, admit that said certificate of insurance insured said aircraft, but deny knowledge or information sufficient to form a belief as to the mortgages upon said aircraft, or the respective priority thereof.

V.

Answering Paragraph V, deny the allegations contained therein, for the reasons that the required premium for the issuance of said endorsement Number Six was never paid; that said endorsement was not intended by the parties to become a part of, and it did not in fact become a part of, said certificate of insurance.

VI.

Answering Paragraph VI, admit the allegations contained therein.

VII.

Answering Paragraph VII, deny knowledge or information sufficient to form a belief as to the allegations contained therein.

VIII.

Answering Paragraph VIII, admit that certificate No. A-12356-179 (Exhibit B) expired on October 24, 1955, and that certificate No. A-12732-178 (Exhibit A) was thereafter issued, but, except as so specifically admitted, deny the allegations contained therein.

IX.

Answering Paragraph IX, deny the allegations contained therein.

X.

Answering Paragraph X, deny the allegations contained therein, and allege that said aircraft was substantially destroyed on December 18, 1955, under circumstances absolutely voiding any insurance coverage which might otherwise have been afforded plaintiffs with respect to said aircraft, under the terms of said certificate of insurance.

XI.

Answering Paragraph XI, admit demand and non-payment, but deny that any sum whatever is due from answering defendants to plaintiffs under said certificate of insurance.

Third Alleged Alternative Cause of Action

I.

Answering Paragraph I, repeat and reallege Paragraphs I through XI of this answer to plaintiffs' second alleged cause of action.

II.

Answering Paragraph II, deny the allegations contained therein so far as they concern defendant Farwest, and deny knowledge or information sufficient to form a belief as to the allegations contained therein insofar as the same relate to defendant Coffey.

III.

Answering Paragraph III, deny the allegations contained therein.

Further Answering Plaintiffs' Complaint, Defendant D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency, Allege as Follows:

I.

At all times material herein said defendant was and is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having an office and place of business at the Exchange Building, Seattle, Washington, and said defendant was and is a duly licensed insurance broker under the laws of the Territory of Alaska, and has duly complied with all the laws thereof respecting said license.

Further Answering the Plaintiffs' Complaint, and for a First, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Annexed hereto, marked "Exhibit A," is a true and correct copy of the "Face Sheet" of the certificates of insurance mentioned in the plaintiffs' complaint, which document contains a portion of the terms and conditions under which said certificates of insurance were issued.

II.

At the time of its destruction on or about December 18, 1955, the aircraft mentioned in plaintiffs' complaint was being operated by plaintiff Cordova Airlines, Inc., for an unlawful purpose, with the knowledge and consent of said plaintiff, in violation of Clause 4, "General Exclusions," and not in accordance with operations limitations established by the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," in that said aircraft was then and there being used for the transportation of a quantity of dynamite, with the result that the loss of said aircraft was not covered by the certificate of insurance at the time of its destruction.

Further Answering the Plaintiffs' Complaint, and for a Second, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Repeats and realleges Paragraph I of said defendant's first affirmative defense.

II.

At the time of its destruction, on or about December 18, 1955, the aircraft mentioned in plaintiff's complaint was being operated contrary to the applicable operations limitations and approved operations manual of the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," of the certificate of insurance, in that said aircraft was overloaded.

Further Answering the Plaintiffs' Complaint, and for a Third, Separate and Complete Defense Thereto, Defendant Underwriters at Lloyd's of London Alleges as Follows:

I.

Repeats and realleges the allegations contained in Paragraph I of said defendant's first affirmative defense.

II.

At the time of its destruction, on or about December 18, 1955, the aircraft mentioned in plaintiffs' complaint was being operated contrary to the applicable operations limitations and approved operations manual of the United States Civil Aeronautics Authority, in violation of Clause 2, "General Conditions," of the certificate of insurance, in that plaintiff Cordova Airlines, Inc. had caused to be installed on said aircraft wheel skis and a tail ski, which modifications had not been approved by the Civil Aeronautics Authority designee or the appropriate Civil Aeronautics Authority Aviation Safety agent, with the result that the loss of said aircraft was not covered by the certificate of insurance at the time of its destruction.

Counterclaim of Defendant Underwriters at Lloyd's of London Against Plaintiff Cordova Airlines, Inc.

I.

Repeats and realleges all of the allegations, ad-

missions and denials contained in the foregoing answer.

II.

In the event that defendant Underwriters at Lloyd's of London should be adjudged to be liable, in any amount, to plaintiff National Bank of Alaska by reason of alleged endorsement No. 6 to insurance policy No. A-12732-178 (attached to plaintiffs' complaint as "Exhibit A"), which liability and endorsement are specifically denied, then, and in such event, said defendant Underwriters at Lloyd's of London is entitled to judgment over against plaintiff Cordova Airlines, Inc. for any such sum as may be awarded plaintiff National Bank of Alaska, by reason of the following provision, among others, contained in said endorsement:

> "Whenever this company shall pay the mortgagee any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party and to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee the whole principal due or grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogati

shall impair the right of the mortgagee to recover the full amount of its claim."

Wherefore answering defendants demand judgment dismissing the plaintiffs' complaint as to them, with costs and a reasonable attorneys' fee, and pray that they may have such other, further or different relief as the cause of justice may require; and, as to the counterclaim of defendant Underwriters at Lloyd's of London, that said defendant may be awarded judgment against plaintiff Cordova Airlines, Inc. for any sum which may be awarded plaintiff National Bank of Alaska by reason of alleged endorsement No. 6 of certificate of insurance No. A-12732-178 annexed to plaintiffs' complaint.

MOODY & TALBOT,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendants Underwriters at Lloyd's of London and D. K. Macdonald & Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on its first and third causes of action.

Dated at Anchorage, Alaska, this 21st day of June, 1956.

McCUTCHEON & NESBETT,

By /s/ BUELL A. NESBETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

STIPULATION FOR DISMISSAL

It is hereby stipulated by and between Plaintiff National Bank of Alaska, a corporation, and Defendant Coffey-Simpson Agency, Inc., that the action filed herein by the said Plaintiff may be and it is hereby dismissed without prejudice as against the said Defendant Coffey-Simpson Agency, Inc., only, each party to bear its own costs.

Dated, at Anchorage, Alaska, this 17th day of July, 1956.

/s/ BUELL A. NESBETT,
Of Attorneys for Plaintiffs.

/s/ EDGAR PAUL BOYKO,
Of Attorneys for Defendant Coffey-Simpson Agency, Inc.

/s/ ARTHUR D. TALBOT,
Of Attorneys for Defendant Underwriters at Lloyd's of London, Farwest General Agency.

[Endorsed]: Filed July 18, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

The Defendant Coffey-Simpson Agency, Inc., by Edgar Paul Boyko and Raymond E. Plummer, its attorneys, moves the Court to dismiss the action, and particularly the claim alleged in the third alternative cause of action, as against the said Defendant Coffey-Simpson Agency, Inc., because the Complaint, and particularly said third alternative cause of action, fails to state a claim against the said Defendant upon which relief can be granted, for the following reasons:

1. The said Complaint fails to allege what, if any, duty was owed by the said Defendant to the Plaintiff Cordova Airlines and the manner in which said duty is alleged to have been breached.

2. The said Complaint fails to set forth in what manner the Plaintiff Cordova Airlines, Inc., was, or could have been, injured by the alleged negligence of the Defendant Coffey-Simpson Agency, Inc.

3. The said Complaint fails to allege in what manner the said Defendant Coffey-Simpson Agency, Inc., is claimed to have been negligent and, having set forth the fact that the said Defendant is a body corporate, fails to allege that the acts claimed to have been negligent were committed by any of the agents, servants, employees or representatives of said corporate Defendant and that such acts were

within the scope of authority or employment of such agents, or acquiesced in, condoned, or ratified by the said corporate Defendant.

4. The said Complaint fails to allege that the Defendant Coffey-Simpson Agency, Inc., had any notice of the substitution of mortgagees alleged to have taken place with respect to the insured aircraft, based upon which notice the said Defendant could or should have taken any legally required action.

5. The said Complaint shows upon its face that no privity of contract existed as between the Plaintiff, Cordova Airlines, Inc., and the Defendant Coffey-Simpson Agency, Inc., with respect to Endorsement No. 6, being a separate document attached to the insurance certificate filed herein as Plaintiff's Exhibit "A."

6. The said Complaint, and particularly Exhibit "A" thereof, shows upon its face that the said Endorsement No. 6 was never executed on behalf of either party to said contract and is therefore of no force and effect.

7. The said Complaint fails to allege any consideration for the assumption of the greater insurance risk alleged to have been incurred by virtue of the said Endorsement No. 6 referred to hereinabove.

8. The said Complaint shows upon its face that if Defendant was negligent, then Plaintiff must have been guilty of contributory negligence.

9. The said Complaint fails to comply with the requirements of Section 36-6-7, ACLA 1949, as amended by Chapter 25, SLA 1951.

/s/ EDGAR PAUL BOYKO,

/s/ RAYMOND E. PLUMMER,
Attorneys for Defendant Coffey-Simpson Agency, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

HEARING ON MOTION TO DISMISS

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, cause No. A-12,349, entitled Cordova Airlines, Inc., and National Bank of Alaska, a Corporation, plaintiffs, versus Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., defendants, came on regularly for Hearing on Motion to Dismiss; Buell Nesbett present for and in behalf of plaintiffs; Edgar P. Boyko present for and in behalf of defendants; the following proceedings were had, to wit:

Argument to the Court was had by Edgar P. Boyko for and in behalf of defendants.

Argument to the Court was had by Buell Nesbett for and in behalf of the plaintiffs.

Argument to the Court was had by Edgar P. Boyko for and in behalf of the defendants.

Whereupon, the Court being fully advised in the premises, and having heard the argument of respective counsel, reserved its decision.

Entered August 17, 1956.

[Title of District Court and Cause.]

MINUTE ORDER RENDERING ORAL DECISION

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time, arguments having been had heretofore and on the 17th day of August, 1956, in cause No. A-12,349, entitled Cordova Airlines, Inc., and National Bank of Alaska, a Corporation, plaintiff, versus Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., defendants; the Court now makes and renders its oral decision;

Court now denies motion to dismiss.

Entered October 30, 1956.

[Title of District Court and Cause.]

MINUTE ORDER IN RE TRIAL DATE

Before the Honorable J. L. McCarrey, Jr., District Judge.

Now at this time upon the Court's own motion,

It Is Ordered that the above cause be, and it is hereby, to be ready for trial upon 30 days' notice.

Entered January 2, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
COFFEY-SIMPSON AGENCY, INC.

Defendant Coffey-Simpson Agency, Inc., by Edgar Paul Boyko and Raymond E. Plummer, its attorneys, for its answer to the Complaint herein and particularly to the claim alleged in the Third Alternative Cause of Action, alleges as follows:

First Defense

The said Complaint, and particularly the Third Alternative Cause of Action therein contained, fails to state a claim against this defendant upon which relief can be granted.

Second Defense

I.

Answering paragraph I of the Third Alternative Cause of Action, insofar as it realleges paragraph

I of the Second Alternative Cause of Action, this answering defendant admits that the plaintiff Cordova Airlines, Inc., is an Alaska corporation but denies each and every other allegation in said paragraph contained and further states that said paragraph fails to comply with Section 36-6-7 ACLA 1949, as amended by Chapter 25, SLA 1951.

II.

Further answering said paragraph I, insofar as it realleges paragraph II of the Second Alternative Cause of Action, this defendant admits that it quoted insurance rates to said plaintiff but denies knowledge or information sufficient to form a belief as to remainder of the allegations contained in said paragraph and therefore denies the same.

III.

Further answering said paragraph I, insofar as it realleges paragraph III of the Second Alternative Cause of Action, defendant admits the issuance of said certificate, but denies each and every other allegation contained in said paragraph.

IV.

Further answering said paragraph I, insofar as it realleges paragraph IV of the Second Alternative Cause of Action, defendant admits that said certificate of insurance insured said aircraft, but denies knowledge or information sufficient to form a belief as to the mortgages upon said aircraft, or the respective priority thereof and therefore denies the same.

V.

Further answering said paragraph I, insofar as it realleges paragraph V of the Second Alternative Cause of Action, defendant denies the allegations therein contained and further says that the said endorsement was never validly executed; did not become part of the said certificate of insurance, and that this defendant was not, and was never intended to be, a party or privy to, or in any other manner responsible for, the said Endorsement No. 6 or any of the contents thereof.

VI.

Further answering said paragraph I, insofar as it realleges paragraph VI of the Second Alternative Cause of Action, defendant admits the allegations contained therein, but says that this defendant was not, and was never intended to be, a party or privy to, or in any other manner responsible for, the said Endorsement No. 7 or any of the contents thereof.

VII.

Further answering said paragraph I, insofar as it realleges paragraph VII of the Second Alternative Cause of Action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

VIII.

Further answering said paragraph I, insofar as it realleges paragraph VIII of the Second Alternative Cause of Action, this defendant admits the ex-

piration and renewal of the respective certificates of insurance, but denies each and every other allegation contained in said paragraph.

IX.

Further answering said paragraph I, insofar as it realleges paragraph IX of the Second Alternative Cause of Action, this defendant denies the allegations therein contained.

X.

Further answering the said paragraph I, insofar as it realleges paragraph X of the Second Alternative Cause of Action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

XI.

Further answering the said paragraph I, insofar as it realleges the allegations contained in paragraph XI of the Second Alternative Cause of action, this defendant denies knowledge or information sufficient to form a belief as to the allegations contained therein and therefore denies the same.

XII.

Answering paragraph II of the Third Alternative Cause of Action, this defendant denies each and every allegation contained therein.

XIII.

Answering paragraph III of the Third Alternative Cause of Action, this defendant denies each

and every allegation contained therein and further says that plaintiff Cordova Airlines, Inc., was not and could not be injured or damaged in any manner as a result of one certain mortgagee being named instead of another in the said certificate of insurance or any endorsement thereof, because under the express terms of the endorsement No. 6, relied on by said plaintiff, and particularly the fourth paragraph thereof, the said plaintiff was and is required to repay to the insurer therein named any and all amounts of insurance paid to such mortgagee on account of its interest in the insured aircraft, regardless of the identity of such mortgagee. This defendant therefore further says that it appears upon the face of the Complaint that, as a matter of law, the said plaintiff did not, and could not, sustain any damage as alleged.

XIV.

Further answering the said Complaint, this defendant hereby denies each and every allegation thereof not herein specifically admitted.

Third Defense

For its Third and Affirmative Defense, defendant says that if in fact defendant negligently damaged the said plaintiff as alleged in the Complaint, which defendant denies, that said plaintiff was guilty of contributory negligence in failing to examine the said endorsement prior to execution, if in fact it was ever executed, to see whether or not the proper party was named therein as mortgagee;

in failing to bring to this defendant's attention the alleged failure to name the proper party as mortgagee; in failing to notify the said defendant of the fact of the alleged substitution of National Bank of Alaska for Reconstruction Finance Corporation as mortgagee; and in failing to demand that such substitution be made by endorsement or otherwise after issuance of said Endorsement No. 6, if in fact said endorsement was ever issued.

Fourth Defense

For its Fourth and affirmative defense herein, this defendant says that the alleged agreement contained in said Endorsement No. 6 referred to in the Complaint herein is void for want of any consideration whatsoever.

Fifth Defense

For its Fifth and affirmative defense herein, this defendant says that the alleged agreement contained in Endorsement No. 6 set forth in the Complaint herein, was an agreement to answer for the debt of another, to wit, the debt of the plaintiff Cordova Airlines, Inc., to the mortgagee therein named and neither said agreement nor any note or memorandum thereof was ever made in writing and subscribed by the party to be charged or by its lawfully authorized agent as required by the laws of the Territory of Alaska and specifically Section 58-2-2 ACLA 1949, as amended by Chapter 96, SLA 1955.

Sixth Defense

I.

For its Sixth and affirmative defense herein, this defendant says that it was stipulated and agreed in and by the certificate of insurance set forth in the Complaint that the aircraft covered thereby shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with Operations authorized as set forth therein.

II.

At the time of the destruction of the aircraft mentioned in plaintiff's Complaint the same was being operated contrary to said Operations Limitations and Operations Manual, in violation of the stipulations of the said certificate of insurance, in that said aircraft was overloaded; and, further, in that said aircraft was carrying modified equipment which had not been approved by appropriate authority; and, further, in that said aircraft was then and there being used for the transportation of explosives, contrary to applicable regulations.

III.

The aforesaid failure to comply with the terms and conditions of said certificate of insurance on the part of the plaintiff was done without the knowledge or consent of this defendant.

Seventh Defense

I.

For its Seventh and affirmative defense herein,

this defendant herein realleges and incorporates by reference the allegations contained in paragraphs I through III of the Sixth Defense herein.

II.

The loss alleged to have been sustained by the plaintiff, if it was sustained at all, resulted from matters and things excepted or excluded from coverage by the certificate of insurance set forth in the Complaint.

Eighth Defense

For its Eighth and affirmative defense herein, defendant says that it is a corporation of the Territory of Alaska, created and existing pursuant to the laws thereof and that if in fact it has been guilty of any negligent act or omission, which defendant denies, then such acts alleged to have been negligent would have to be done by agents, servants or employees of the said defendant and that said agents were not acting within the scope of their employment or authority, or by virtue of any condonation, acquiescence or ratification by this defendant, and that this defendant under its Articles of Incorporation and the laws of the Territory of Alaska did not and still does not have the power to do the alleged negligent acts or omissions averred in the Complaint.

Wherefore, having fully answered the Complaint herein, this answering defendant demands judgment dismissing the Complaint as to it, with costs and a reasonable attorneys' fee, and prays that it

may have such other and further relief as this Honorable Court deems equitable and just.

/s/ EDGAR PAUL BOYKO,

/s/ RAYMOND E. PLUMMER,

Attorneys for Defendant Coffey-Simpson Agency, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed January 21, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF JUDICIAL DISQUALIFICATION

United States of America,
Territory of Alaska—ss.

Edgar Paul Boyko, being duly sworn, deposes and says:

1. That he is one of the attorneys for the defendant Coffey- Simpson Agency, Inc., in the above-entitled cause and that he makes this affidavit of judicial disqualification pursuant to Section 54-2-1 ACLA 1949.

2. That the Honorable Judge before whom the above action is to be tried or heard is disqualified to act herein because he has a personal bias in favor of the plaintiff herein, Cordova Airlines, Inc., by reason of the fact that he represented the said corporate plaintiff as its attorney for many years, is

personally friendly with its president, founder and major stockholder, Merle Smith, and is deeply and sincerely interested in said plaintiff's welfare and success.

3. That this affidavit is made in good faith and not for the purpose of delay and that the above action is at issue and has been since the 11th day of February, 1957.

/s/ EDGAR PAUL BOYKO.

Subscribed and Sworn to before me, a Notary Public in and for the Territory of Alaska, this 13th day of February, 1957.

[Seal] /s/ CAROL M. WHITE,
Notary Public in and for
Alaska.

My commission expires: 8-16-1958.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.]

ORDER

Upon filing of an affidavit on behalf of defendants, pursuant to Sec. 54-2-1 ACLA 1949, and good cause appearing therefor, it is by the Court

Ordered that the undersigned District Judge does hereby disqualify himself from acting in the above-

entitled cause and that the Clerk is directed to place the said cause upon the calendar of cases to be tried before a Visiting Judge.

Dated at Anchorage, Alaska, this 14th day of January, 1957.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed February 14, 1957.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant Underwriters at Lloyd's of London requests plaintiff Cordova Airlines, Inc., within twenty days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

I.

On the flight on December 18, 1955, on which it was destroyed, Cessna 180 N-1569-C, the aircraft of plaintiff Cordova Airlines, Inc., which is the subject matter of this action, was being operated by Cordova Airlines in the transportation of cargo for Morrison-Knudsen Co., Inc.

II.

The cargo mentioned in the preceding paragraph consisted of dynamite.

III.

The dynamite mentioned in the preceding paragraph was a brand or type known as "Atlas Giant 40% Blasting Gelatin."

IV.

The aforementioned cargo of dynamite was stowed aboard plaintiff's aircraft in cardboard boxes, each box weighing, including contents, approximately fifty-two pounds.

V.

Upon the flight in question plaintiff's aircraft had as cargo on board sixteen of the aforementioned cardboard boxes of dynamite.

VI.

On the flight on which it was destroyed the aforementioned Cessna aircraft was loaded with a weight of cargo, gasoline, etc., exceeding the Operations Limitations and Approved Operations Manual of the U. S. Civil Aeronautics Authority for said aircraft.

VII.

Prior to its destruction on December 18, 1955, plaintiff Cordova Airlines, Inc., had caused to be installed on said Cessna aircraft wheel skis and a tail ski, which modifications had not been approved by the Civil Aeronautics Authority designee or the

cognizant Civil Aeronautics Authority aviation safety agent.

MOODY & TALBOT,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendant Underwriters at Lloyd's of London.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1957.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

Plaintiff Cordova Airlines, Inc., responds to the request for admission herein and through its President admits and denies as follows:

I.

Admits Request No. I.

II.

Admits Request No. II.

III.

States that it cannot truthfully admit or deny Request No. III as the exact nature or descriptive designation of the dynamite is not known to affiant.

IV.

Admits that each box of dynamite including carton weighed fifty pounds.

V.

Denies request No. V.

VI.

Denies Request No. VI.

VII.

Denies Request No. VII except to admit that a wheel/ski combination rig had been installed on the aircraft in question.

/s/ MERLE K. SMITH.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed May 10, 1957.

[Title of District Court and Cause.]

DISMISSAL WITH PREJUDICE AS TO DEFENDANT COFFEY-SIMPSON AGENCY, INC.

It is hereby stipulated by and between the Plaintiff Cordova Airlines, Inc., and the Defendants Underwriters at Lloyd's of London, Farwest General Agency and Coffey-Simpson Agency, Inc., by and through their respective attorneys of record, that the action filed herein by the Plaintiff Cordova Airlines, Inc., may be, and it hereby is, dismissed with prejudice as against the said Defendant

Coffey-Simpson Agency, Inc., only, the parties to bear their respective costs.

Dated at Anchorage, Alaska, this 20th day of May, 1958.

/s/ BUELL A. NESBETT,
Attorney for Plaintiff
Cordova Airlines, Inc.

/s/ ARTHUR D. TALBOT,
Of Counsel for Defendants Underwriters at Lloyd's of London and Farwest General Agency.

/s/ RAYMOND E. PLUMMER,
Of Counsel for Defendant
Coffey-Simpson Agcy., Inc.

[Endorsed]: Filed May 21, 1958.

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To: Buell A. Nesbett, Esq.,
Attorney for Plaintiffs.

Sir:

Please take notice that Defendants hereby require and request Plaintiffs to produce and have available at the trial of the above-entitled action all of the documents described and set forth in Defendants' motion for production of documents dated May 27, 1958, or such of said documents as are

within the possession, custody or control of the Plaintiff corporations, their attorneys, agents, employees, et cetera.

Dated May 27, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants Underwriters at Lloyd's of London and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS

To: Buell A. Nesbett, Esq.,
Attorney for Plaintiffs.

Sir:

Please take notice that on the 29th day of May, 1958, at the hour of 1:30 p.m. o'clock on said day, or as soon thereafter as counsel can be heard, Defendant Underwriters at Lloyd's of London will move the Court for an order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, requiring Plaintiffs, and each of them, to produce the follow-

ing described documents for inspection and photographing by Defendants:

1. The up to date log books of that certain Cessna 180 aircraft known as No. N-1569-C;

2. All investigative reports furnished to Plaintiffs by the U. S. Civil Aeronautics Board and Civil Aeronautics Administration pertaining to the airplane crash which is the subject matter of this action, including copies of any and all exhibits, regulations or other documents so furnished to Plaintiffs;

3. The loan records of Plaintiff National Bank of Alaska reflecting any and all payments received by it to date upon said Plaintiff's note and mortgage upon said Cessna 180 aircraft;

4. The Airworthiness Certificate in force for said aircraft upon the date of its loss;

5. All CAA forms ACA 337 showing maintenance and alterations upon said aircraft from the date of its acquisition by Plaintiff Cordova Airlines, Inc., to date of its loss;

6. All policies or certificates of insurance which plaintiff Cordova Airlines, Inc., claims were in force with respect to said aircraft upon the date of its loss;

7. Any and all certificates obtained or secured by Plaintiff Cordova Airlines, Inc., from the shipper of any explosives laden upon said aircraft on December 17 or December 18, 1955, said certificates

having to do with the contents of any such packages of explosives, and the compliance of said explosives and their packages with applicable regulations of the Civil Aeronautics Board and the Interstate Commerce Commission;

8. Any and all waivers secured by Plaintiff Cordova Airlines, Inc., from the Civil Aeronautics Administration or other Government authority permitting or allowing the carriage by said Cessna 180 aircraft of explosives by or for Morrison-Knudsen Co., Inc., on December 17 or 18, 1955;

9. Any writing which Plaintiff Cordova Airlines, Inc., claims constituted permission from Defendant Farwest General Agency for any flying done by said Cessna 180 aircraft on December 17 or December 18, 1955, for which a waiver issued by the Civil Aeronautics Authority was or should have been issued or required;

10. Any and all manifests or other documents showing the nature, description and quantity of any and all cargo and gasoline carried by said Cessna 180 aircraft on December 17 and December 18, 1955;

11. The CAA approved flight manual for Cessna aircraft N-1569-C.

The foregoing motion is based upon the annexed affidavit of Arthur D. Talbot, sworn to the 26th day of May, 1958, and upon all records and proceedings heretofore had herein.

Dated May 27, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants Underwriters at Lloyd's of London and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

United States of America,
Territory of Alaska—ss.

Arthur D. Talbot, being duly sworn, deposes and says:

I am a member of the firm of Boyko, Talbot & Tulin, attorneys for Defendants Underwriters at Lloyd's of London, Inc., and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency. I make this affidavit in support of the motion of said Defendants for an order requiring Plaintiffs to produce the documents described in said motion.

To the best of my knowledge, information and belief, said documents are not privileged, and they constitute or contain evidence relating to matters within the scope of the examination permitted by Rule 26(b).

The principal issue in this case will be whether or not the subject aircraft was, at the time of its loss, engaged in the transportation of a large quantity of high explosives, in violation of applicable

Government regulations and the terms of the applicable certificate of insurance.

In addition, Plaintiff National Bank of Alaska seeks to have the policy of insurance reformed by the addition of a loss payable clause to it, which claim may be moot if said bank has received payment of the obligation secured by its mortgage upon said aircraft, subsequent to the commencement of this action.

/s/ ARTHUR D. TALBOT.

Subscribed and sworn to before me this 26th day of May, 1958.

[Seal] /s/ FERN E. TULIN,
Notary Public in and for
Alaska.

My commission expires: 10/21/61.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

MOTION TO AMEND ANSWER BY ADDING FURTHER AFFIRMATIVE DEFENSES

On the 29th day of May, 1958, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, the undersigned will move

the Court for an order allowing Defendants to amend their answer to the Plaintiffs' complaint by the addition of the following additional affirmative defenses:

I.

For a fourth, separate and complete defense to the plaintiffs' complaint, Defendant Underwriters at Lloyd's of London alleges that at the time of its destruction, on or about December 18, 1955, the aircraft mentioned in Plaintiffs' complaint was engaged in the transportation of a "Class A" explosive, for which flight or movement Plaintiff Cordova Airlines, Inc., failed to obtain a written waiver from the U. S. Civil Aeronautics Administration, in accordance with its regulations, and said Plaintiff also failed to obtain written permission for such flight from Defendant Farwest General Agency, with the result that said flight was for an unlawful purpose, in violation of the terms of the applicable certificate of insurance, and in violation of the terms of said certificate of insurance requiring said Plaintiff to secure written permission from Defendant Farwest General Agency, on behalf of the insurers, for any flight for which a waiver by the Civil Aeronautics Administration was required.

II.

For a fifth, separate and complete defense to the Plaintiffs' complaint, Defendant Underwriters at Lloyd's of London alleges that the flight upon which the aircraft mentioned in the Plaintiffs'

complaint was destroyed was for an unlawful purpose, in that on said flight plaintiff Cordova Airlines, Inc., transported a quantity of explosives without first having received from the shipper thereof a certificate that said shipment complied with the requirements of Part 49 of the Civil Air Regulations, as required by Section 49.3(b) thereof.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,

Attorneys for Defendants Underwriters at Lloyd's of London, and D. K. MacDonald and Company, Inc., d/b/a Farwest General Agency.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1958.

[Title of District Court and Cause.]

HEARING ON MOTION FOR PRODUCTION OF DOCUMENTS AND TO AMEND COMPLAINT

Before the Honorable Harry C. Westover, District Judge.

Now at this time the above cause came on for hearing; Mr. Buell Nesbett present for and in behalf of counsel for Plaintiff. Plaintiff not present in Court. Mr. Arthur D. Talbot present in Court as counsel for Defendant Lloyd's. Defendant not present in Court.

Mr. Talbot on behalf of Defendant stated to Court that this matter was scheduled for hearing this date but he is not certain of hour set.

Court on consulting file, finds time set was 1:30 this date but orders hearing to proceed at this time.

Mr. Talbot then informs Court that counsel have agreed to a pre-trial conference at this time and requests that James E. Fisher be associated with him as defense counsel.

Court ordered Mr. Fisher associated and that matter now proceed as pre-trial hearing.

Pre-Trial Conference

Oral stipulation that Exhibit A of the complaint and face sheet of insurance policy (handed to Court) be entered in the proceeding as Plaintiff's Exhibit 1.

Plaintiff's Exhibit 1 was duly offered, marked and admitted. (Exhibit A of complaint in file and face sheet of insurance policy.)

Mr. Talbot argued to Court that dynamite was at time of incident which is subject of complaint, prohibited cargo.

Mr. Nesbett argued on behalf of Plaintiff.

Mr. Talbot cited case on behalf of Defendant.

Mr. Nesbett cited cases and argued on behalf of Plaintiff.

Entered: May 29, 1958.

[Title of District Court and Cause.]

MOTION FOR DIRECTED VERDICT

Defendants move the Court, pursuant to Rule 50 of the Federal Rules of Civil Procedure, to direct a verdict for Defendants and against the Plaintiff upon Defendants' affirmative defense that Plaintiff's aircraft 1569-C was being used for an unlawful purpose at the time of its destruction, with the knowledge and consent of Plaintiff, upon the following grounds:

1. C.A.B. regulation No. 712, effective December 2, 1955, (Defendants' Exhibit A) did not authorize or apply to the shipment of Class A explosives by Morrison-Knudsen Co., Inc., by this aircraft, which was being utilized by Morrison-Knudsen under a 90-day charter from Plaintiff, for the general carriage of passengers and freight.

2. The knowledge of the pilot, employed and paid by Plaintiff, that he was carrying dynamite, a Class A explosive, is to be imputed to Plaintiff, as a matter of law.

3. The carriage of dynamite was unlawful because it was carried in violation of C.A.B. regulations 49.0 and 49.81, and Sec. 622(b) (1) of Title 49, USC, with the result that the Court must find, as a matter of law, that the airplane was being used for an unlawful purpose. Plaintiff does not dispute that the sole purpose for which the plane

was being used on the flight in question was the transportation of Class A explosives.

4. Dynamite is classified as an explosive A by Sec. 72.5 of the I.C.C. regulations, which classification was adopted by the C.A.B., by Sec. 49.81

5. The shipper did not give any certificate that the shipment of explosives complied with CA.B. regulations, as required by C.A.B. regulation 49.3(b) and Sec. 622(h) (1) of Title 49, USC.

Defendants further move the Court to direct a verdict for the Defendants and against the Plaintiff upon Defendants' affirmative defense that aircraft 1569-C was engaged in flying in which a waiver issued by C.A.A. was required, and that no permission for such flight was obtained from Farwest General Agency, for insurers, upon the following grounds:

1. The carriage of Class A explosives being prohibited by existing C.A.B. regulations, Plaintiff was required to secure a waiver from C.A.A., under C.A.B. regulation 49.3(b), and also the express written consent of Farwest General Agency (policy, General Exclusion 4). It is admitted by Plaintiff that it made no attempt whatever to secure permission for this flight from Farwest General Agency.

For the foregoing reasons, Defendants are entitled, as a matter of law, to a verdict and judgment against the Plaintiff on each of the above separate

and complete affirmative defenses to the Plaintiff's complaint.

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

Copy received: 6/4/58—9:10 a.m.

/s/ BUELL A. NESBETT,
Attorney for Plaintiff.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Defendants' Proposed Instruction No. 1

One of the defenses asserted by the Defendants in this case is that, at the time it crashed, Cordova Airlines aircraft N-1569-C was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives, then you must further determine whether or not any explosive so carried consisted of dynamite. If you determine that the plane was carrying dynamite, then you must next

determine whether or not a waiver was secured from the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, provided you find a waiver was necessary. If you find that the aircraft was carrying dynamite and that no such waiver had been secured from the Civil Aeronautics Authority, and find that a waiver was necessary, then you are instructed that the carrying of dynamite was unlawful. Dynamite is classified by the applicable Government regulations as a Class A explosive, and the transportation of dynamite by civil aircraft was, accordingly, prohibited by such regulations, unless a waiver was secured from issued by the Civil Aeronautics Authority. By Act of Congress, it is a criminal offense for any person to knowingly deliver or cause to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce, or for any person to cause the transportation in air commerce of, any shipment or property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

Concerning the knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question, is a question of fact for you to determine. if you find that dynamite was in fact carried, you are instructed that Ordinarily the knowledge and consent of a agent the pilot of the

aircraft is attributable to and is legally binding upon the principal Cordova Airlines, if you find that the pilot, Herbert Haley, was piloting the aircraft as an employee of Cordova Airlines. To put it another any other way, the knowledge and consent of the pilot is legally imputed to his employer. Accordingly, if you find that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, and if you further find that no special waiver was secured from the Civil Aeronautics Authority for the flight in question, and that the purpose of the flight was for the transportation of dynamite, then you are instructed that the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines, and your verdict must be for the Defendants and against the Plaintiff.

Citations

Certificate of Insurance, General Exclusion 4.49 USC Sec. 401 (3), 20(a), 32. 49 USC Sec. 560(a). 49 USC Sec. 622(h) (1). 14 CFR Sec. 59.0, 49.81, 49.71, 49 CFR Sec. 72.5 ("dynamite" and "blasting gelatin" are both classified as "high explosives," which, in turn, are classified as "Explosives A.") Sec. 72.5, right hand column of table, which governs maximum quantity permissable in one outside container, if shipped by rail express, provides, for high explosives, "See Section 73.86." Sec. 73.86(d) limits the shipment of explosives by rail express

to samples for examination and by a laboratory only, limits their packaging to wooden boxes, and limits the quantity for one outside package to 20 one-half pound-samples. Defendants contend that Class A explosives are prohibited for civil aircraft by the terms of Sec. 49.81, whether or not they can be shipped by rail express. Defendants submit, further, however, that the 50-pound cases of dynamite which was carried on the flight in question could not lawfully have been shipped even by rail express.

Defendants' Proposed Instruction No. 2

Further reference is made to the defense asserted that Cordova Airlines aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of aircraft shall knowingly accept explosives for carriage by air unless the shipper or his authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with Civil Aeronautics Board regulations governing the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to the carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority, for the flight upon which this aircraft was

destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955, was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the Defendants and against the Plaintiff, on this issue, without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the aircraft was destroyed.

Citation

Certificate of Insurance, General Exclusion 4.49 USC Sec. 622(h). 14 CFR Sec. 49.3(b).

Defendants' Proposed Instruction No. 4

One of the defenses which the Defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulations. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next de-

termine whether or not the aircraft was laden in excess of its legal limit. If you find that at the time it crashed the aircraft was overloaded, in violation of its Operations Limitations or C.A.A. approved Operations Manual, then your verdict must be for the Defendants and against the Plaintiff, on this issue.

Citation

Certificate of Insurance, General Condition No. 2. No causal relation between crash and violation of regulations prohibited by the certificate of insurance need be shown. 127 F. Supp. 124, affirmed 222 F. 2d. 642.

Defendant's Proposed Instruction No. 5

Defendants allege and claim three distinct defenses under the certificate of insurance:

1. That the aircraft was being used for an unlawful purpose, with the knowledge and consent of Cordova Airlines;

2. That the aircraft was engaged in flying for which a waiver issued by the Civil Aeronautics Authority was required, with the result that Cordova Airlines should first have secured the express written consent of Farwest General Agency, of Seattle, Washington, as agent for the Defendants; and

3. That the aircraft was not being operated in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, for

the alleged reason that the aircraft was overloaded, in alleged violation of such regulations.

You are instructed that the Defendants have are permitted to asserted each of these three defenses, which are based upon provisions in the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the Defendants and against the Plaintiff if you find, by a preponderance of the evidence, having in mind all of the instructions given you by the Court, that the Defendants have established all or any one of these three defenses. You are also instructed that Defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, the Defendants need not have proved that the alleged carriage of dynamite, or the alleged overloading of the aircraft, in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.

Citations

Traveler's Protective Association of America v. Prinsen 291 U S 576. Bruce v. Lumbermen's Mutual Casualty Co. 127 F. Supp. 124, affirmed 222 F. 2d 642. Globe Indemnity Co. v. Hansen 231 F. 2d 895. At the pre-trial conference counsel for Plaintiff sought to inject the issue of negligence into this case, by asserting that general condition 2 is modified by general condition 3, which requires the

assured to "use due diligence" etc. A re-reading of the certificate makes clear, however, that general condition 3 refers to Sections 1 and 2 of the certificate "Loss or Damage to Aircraft" and "Third Party Liability") and general condition 3 in no way modifies or detracts from the force of the general exclusions of the policy, or from general condition 2. General condition 3 clearly imposes an additional duty of "due diligence" upon the assured, a possible defense which Defendants have not chosen to assert in this action.

Respectfully submitted,

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

[Endorsed]: Filed June 4, 1958.

PLAINTIFF'S PROPOSED INSTRUCTIONS

Plaintiff's Proposed Instruction No. 1

The Defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the weight permitted in the Operations Limitations as established by the Civil Aeronautics Authority and was therefore in violation of Paragraph 2 of

the General Conditions contained in the policy of insurance which reads as follows:

"2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. approved Operations Manual, and in accordance with operations authorized as set forth therein."

The Defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

In connection with this defense you are instructed that you must also consider paragraph 3 of the General Conditions of the policy of insurance, which, insofar as applicable to this defense, reads as follows:

"3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy."

In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all of the evidence presented by both Plaintiff and Defendants to determine whether the Defendants have proven by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. If you find that the Defendants have not proven by a preponderance of the evidence

that the airplane was loaded in excess of its permissible load limits you must find for the Plaintiff and against the Defendants on this defense.

If you find that the Defendants have proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limit you must then consider this fact in connection with Paragraph 3 of the General Conditions of the Policy, quoted in this instruction, and determine whether or not the Defendants have proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading. If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading then you must find for the Plaintiff on this defense.

If you find that the airplane was loaded in excess of its permissible load limits and that the actual loss of the airplane was caused by such overloading then you must further consider Paragraph 3 of the General Conditions and determine whether the Plaintiff could, by the exercise of due diligence and doing all things reasonably practicable, have prevented the loss. In order to find against the Plaintiff in this respect you must find that if the plaintiff, Cordova Airlines, had exercised due diligence in doing and concurring in doing all things reasonably practicable that it could have prevented the loss.

Plaintiff's Proposed Instruction No. 2

The defendants contend, among other defenses, that paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of Civil Air Regulations and that the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:

"This certificate and/or policy does not cover:

> * * *; the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured."

This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defense by a preponderance of the evidence.

In this connection you are instructed that the word "purpose" is defined as:

> "The object; effect, or result, aimed at, intended, or attained." Websters International Dictionary.

You are instructed that the meaning of the word "use" is defined as:

> "The purpose served—a purpose, object, or end for useful or advantageous nature, im-

plying that the person receives a benefit from the employment of the factor involved." Great American Indemnity Co. vs. Solzman, CCA 8th 1954, 213 F(2) 743, 746.

You are also instructed that the policy of insurance here involved in paragraph 8 reads as follows:

"8. Purposes for which aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction."

If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airline, Inc.

If you find that the defendants have proven by a preponderance of the evidence that in attempting to transport dynamite from Iliamna Bay to Big Mountain the airplane was being used for an unlawful purpose then you must consider whether or not

such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines.

In this connection you must consider all of the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of responsible officials of the plaintiff Cordova Airlines, Inc.

Plaintiff's Proposed Instruction No. 3

The defendants contend among other defenses that for the flight in question the plaintiff failed to obtain a written waiver from the Civil Aeronautics Authority as required by Civil Air Regulations Part 49 and also failed to obtain written permission from Far West General Agency to make the flight in question.

The policy of insurance reads as follows insofar as applicable to this defense:

"This Certificate and/or Policy does not cover:

"1. Any loss, damage or liability arising from:

* * *

"(c) * * * or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendant's Exhibit

A amounts to blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific written waiver from Civil Aeronautics Authority.

In this connection you are instructed that the Civil Aeronautics Act defines "United States" as:

> "United States" means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof."

The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain, and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

If you believe that Defendant's Exhibit A contained blanket authority for plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

If you believe that Defendant's Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider

paragraph 1 (c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane "arose from" and was "the result of" the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

If you find that the loss of the airplane "arose from" or was "the result of" plaintiff's failure to obtain a specific waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent of Farwest General Agency, then you must find for the defendants on this defense.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

TRIAL BY JURY CONTINUED

Before the Honorable Harry C. Westover,
District Judge.

Now came the respective parties and their respective counsel as heretofor and it was stipulated Jury in Box.

Motion for directed verdict filed by attorneys for defendants, denied under the rules.

Court instructs Jury.

Bailiffs Oscar Olson and Lee Williams sworn.

At 10:50 o'clock a.m. trial jury retired with their sworn bailiffs to deliberate upon a verdict.

Now at 2:45 o'clock p.m. came the jury, in charge of their sworn bailiffs, came also the plaintiff with Buell A. Nesbett, its counsel, came also the defendant appearing by and through its counsel, David Talbot, and said jury did present, by and through their foreman, in open court, their verdict in the above cause, which is in words and figures as follows, to-wit:

which verdict the Court ordered filed and discharged the jury to report at 10:00 o'clock a.m. of Monday June 9, 1958.

[Title of District Court and Cause.]

HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR NEW TRIAL

Before the Honorable Harry C. Westover,
District Judge.

Now at this time hearing on motion for Judgment notwithstanding the verdict or motion for new trial came on regularly before the Court. Arthur David Talbot present for and in behalf of the defendant; Buell A. Nesbett, present for and in behalf of the plaintiff.

Arthur David Talbot, for and in behalf of the defendant moves for permission to submit written order amending motion to read as follows:

Motion for Judgment notwithstanding the verdict And motion for new trial. Motion granted.

Argument to the Court was had by Arthur David Talbot for and in behalf of the defendant.

Argument to the Court was had by Buell A. Nesbett, for and in behalf of the plaintiff.

Closing argument to the Court was had by Arthur David Talbot, for and in behalf of the defendant.

Motions denied.

Entered June 20, 1958.

[Title of District Court and Cause.]

VERDICT No. 1

We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.

Dated at Anchorage, Alaska, this 4th day of June, 1958.

/s/ KYLE I. TURNER,
Foreman.

[Endorsed]: Filed and entered June 4, 1958.

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

To: Buell A. Nesbett, Esq., Attorney for Plaintiff, First National Bank Building, Anchorage, Alaska.

Please Take Notice that the undersigned will bring the following motion on for hearing before this Court on the 16th day of June, 1958, at 10:00 a.m. on said day, or as soon thereafter as counsel can be heard.

Defendants move the Court to set aside the verdict and any judgment entered thereon and to enter judgment for the defendants, in accordance with their motion for a directed verdict, which was submitted at the close of all the evidence at the trial, or, in the alternative, for a new trial.

Defendants' motion to set aside the verdict and any judgment entered thereon and for judgment in accordance with defendants' motion for a directed verdict is made upon the grounds set forth in the defendants' aforementioned motion for a directed verdict, which written motion, including the grounds set forth therein, is hereby repeated and realleged, with the same force and effect as if herein repeated and set forth at length.

If, for any reason, defendants' motion for judgment notwithstanding the verdict is denied, then, and in that event, defendants hereby move the Court for a new trial, by reason of the following erroneous, misleading and confusing jury instructions given by the Court:

1. "If you find that the defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading then you must find for the plaintiff on this defense."

2. "If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Illiamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

"In this connection you must consider all of the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of the plaintiff Cordova Airlines, Inc.

"In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc."

3. "In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as exhibit B amounts to blanket authority to deviate from part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific written waiver from Civil Aeronautics Authority."

4. "If you believe that exhibit B contained blanket authority for plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

"If you believe that exhibit B did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1c of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from' and was 'the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

"If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to

obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent of Farwest General Agency, then you must find for the defendants on this defense."

5. The Court further erred in instructing the jury to resolve all ambiguities in the certificate of insurance against the defendants. There is no ambiguity in the three provisions of the certificate of insurance relied upon by defendants to support their three affirmative defenses and, if the Court believed that there were any ambiguities in said provisions, then the Court had a duty to interpret and construe said provisions, and to instruct the jury accordingly.

JAMES E. FISHER,
BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1958.

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC.,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD.,

Defendants.

JUDGMENT

This case came on for trial commencing June 2, 1958, before the Honorable Harry C. Westover, Federal District Judge, sitting at Anchorage, Alaska, the plaintiff, Cordova Airlines, Inc., being represented by its president, Merle Smith and Buell A. Nesbett, its attorney, and the defendants being represented in court by their attorneys, Arthur D. Talbot and James Fisher; a jury of twelve persons was regularly impaneled and sworn to try the cause; oral testimony and documentary proof was introduced and admitted on behalf of the plaintiff and defendants, whereupon the Court instructed the jury on the law concerning the issues involved and counsel for both sides having argued the matter to the jury, the jury thereupon retired to consider its verdict at the close of the trial on June 4, 1958.

The jury returned into Court on the 4th day of June, 1958, with a verdict which was handed to the Court in the presence of the jury and found to be a verdict in favor of the plaintiff, reading as follows:

> "Verdict No. 1.
>
> "We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.
>
> "Dated at Anchorage, Alaska, this 4th day of June, 1958.
>
> "KYLE I. TURNER,
> "Foreman."

Wherefore by virtue of the law and by reason of the premises aforesaid it is hereby

Ordered, Adjudged and Decreed that judgment be and it is hereby given in favor of the plaintiff, Cordova Airlines, Inc., against the defendants, Underwriters at Lloyd's of London, Victoria Insurance Company, Ltd., Orion Insurance Company, Ltd., Eagle Star Insurance Company, Ltd., in the sum of Fifteen Thousand Two Hundred Dollars ($15,200.00) plus interest at the rate of six per cent (6%) per annum from the 1st day of March 1956, until paid, and that plaintiff shall have and recover from the said defendants plaintiff's costs in the sum of Sixty-five Dollars Ten Cents ($65.10)

and an attorney's fee in the sum of Eight Hundred Two Dollars ($802.00).

Dated at Anchorage, Alaska, this 12th day of June, 1958.

/s/ HARRY C. WESTOVER,
Federal District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 12, 1958.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

Hearing on defendant's motion for judgment notwithstanding the verdict and in the alternative for a new trial came on regularly for hearing before the Honorable Harry C. Westover, Federal District Judge, at 1:30 o'clock p.m. June 20, 1958. The plaintiff was represented by their counsel Buell A. Nesbett and the defendants by their counsel, Arthur D. Talbot, Esq. After hearing argument by both counsel the Court thereupon

Ordered that defendants' motion for judgment notwithstanding verdict and in the alternative for a new trial both be denied.

Dated at Anchorage, Alaska, this 30th day of June, 1958.

/s/ HARRY C. WESTOVER,
Federal District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named defendants, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 12, 1958.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed July 17, 1958.

[Title of District Court and Cause.]

MOTION FOR ORDER SETTING AMOUNT OF SUPERSEDEAS BOND

Defendants move the Court for an order setting the amount of a supersedeas bond to be filed herein

by defendants in connection with their appeal to the United States Court of Appeals for the Ninth Circuit.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants.

ORDER

The above motion having duly come on for hearing on the 25th day of August, 1958, and due deliberation having been had thereon, it is hereby

Ordered that the defendants may present to the Court for its approval, pursuant to Rule 73(d) of the Federal Rules of Civil Procedure, a supersedeas bond, to be approved by the Court, in the sum of $23,000.00.

Dated at Anchorage, Alaska, this 25th day of August, 1958.

/s/ J. L. McCARREY, JR.,
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed and entered August 25, 1958.

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS ON APPEAL

Appellants intend to rely upon the following points on their appeal:

1. The verdict was contrary to the weight of the evidence.
2. The trial judge erred in denying defendants' motion for a directed verdict.
3. The trial judge erred in denying defendants' motions for judgment notwithstanding the verdict and for a new trial.
4. The trial judge erred in giving the erroneous, misleading and confusing jury instructions set forth in detail in defendants' motion for a new trial.
5. Defendants are entitled to judgment against plaintiff, as a matter of law, upon the grounds set forth in defendants' written motion for a directed verdict, and in the argument which was had before the trial judge on June 20, 1958, on defendants' motion for judgment notwithstanding the verdict and for a new trial, transcript, pages 296-318.

BOYKO, TALBOT & TULIN,

By /s/ ARTHUR D. TALBOT,
Attorneys for Defendants-Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed November 28, 1958.

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC., a Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, ET AL.,

Defendants.

DEPOSITION OF MERLE K. SMITH

Appearances:

BUELL A. NESBITT,
Attorney for Plaintiff.

ARTHUR D. TALBOT &
JAMES E. FISHER,
Attorneys for Defendants.

Pursuant to Stipulation, the deposition of Merle K. Smith was taken before Bonnie T. Brick, Notary Public in and for the Territory of Alaska and Official Court Reporter, at the offices of Boyko, Talbot & Tulin, attorneys at Law, Turnagain Arms Building, Anchorage, Alaska, on the 24th day of May, 1958, at the hour of 2:00 o'clock p.m.

Proceedings

Mr. Talbot: This deposition was originally set for 9:00 a.m. on Monday, May 26, 1958, but by

stipulation of counsel, the time has been changed to 2:00 p.m. on Saturday, May 24th.

MERLE K. SMITH

being first duly sworn upon oath, testifies as follows on

Direct Examination

By Mr. Talbot:

Q. Mr. Smith, you will have to bear with me a little bit in some of the questions that I will ask you because of my unfamiliarity with the aircraft industry which you are familiar. Some of the questions may be difficult for you to answer; for that reason, I may not make sense to you, but we will try to do the best we can. A. Okay.

Q. Will you state your full name, sir?

A. Merle K. Smith.

Q. And where do you live, Mr. Smith?

A. Cordova is my home.

Q. And I believe you are the president of Cordova Airlines, Inc.? A. I am.

Q. The plaintiff in this action? A. Yes.

Q. How long have you been president of the Cordova Airlines? [2*]

A. Since 1939 except for an eighteen month period during the war.

Q. Are you a pilot yourself, sir?

A. I am.

Q. How long have you been a pilot?

A. 1928.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Deposition of Merle K. Smith.)

Q. Could you tell us roughly how many hours' experience you have flying as a pilot?

A. Approximately nine thousand.

Q. Do you recall, Mr. Smith, that on December 18th, 1955, at Big Mountain near Lake Iliamna, there was a crash of one of Cordova Airlines planes? A. I do.

Q. And that was what kind of a plane?

A. It was a Cessna 180.

Q. The pilot's name was?

A. Herbert N. Haley.

Q. How long had Cordova Airlines owned that particular plane?

A. I believe we bought that airplane in '53.

Q. Did Cordova buy it new?

A. No, it was second hand.

Q. When was the airplane built, if you know?

A. Well, I believe it was about six months old when we bought it. It would be early in '53. I think it was a '53 model; I am not just definite on that.

Q. What kind of work was this plane engaged in at the time of [3] the crash?

A. Well, it was on a contract to Morrison-Knudsen, Western Electric Company and it was engaged in whatever type of flying that they required him to do.

Q. Was that what's known as a charter contract?

A. Contract—is what we referred to it as a contract.

(Deposition of Merle K. Smith.)

Q. What was the duration of that contract?

A. That, I have forgotten. The starting date, I think, was November 1st.

Q. Could it have been a ninety day contract?

A. It could have, yes.

Q. But in any event, the aircraft had been engaged in this service for some period of time prior to the crash, is that correct?

A. Yes, in excess of thirty days, I believe.

Q. Now, concerning movements of that aircraft during the period that it was chartered to Morrison-Knudsen, what control, if any, did Cordova Airlines have over the question of where the aircraft went and what work it performed?

A. Well, we had no control. That was up to Morrison-Knudsen who sent it where they wanted it to and so on, you see. Our control was through the pilot.

Q. And the pilot was your employee?

A. Yes.

Q. And the pilot was paid by you? [4]

A. Yes.

Q. How long had Cordova employed this particular pilot?

A. Since 1942, outside of occasional furloughs and he was out sometime during the war there for a year or two, but he was originally hired in '42 and then would work for us whenever we needed him, which was pretty much all the time.

(Deposition of Merle K. Smith.)

Q. Does Cordova Airlines own and operate any Cessna 180's at this time?

A. Yes, we have two.

Q. Did you own any others in December of 1955?

A. Yes, we did. We had, I believe we owned a total of three then. However, I don't believe one of them had been delivered yet. It was still enroute from the factory.

Q. Had you owned other Cessna 180's before 1955?

A. No, only the one that crashed. We owned that before '55.

Q. And when you acquired that in 1953, that was the first 180 that you acquired? A. Yes.

Q. When I say "you," I mean Cordova Airlines.

A. Yes.

Q. Well, in operating the Cessna 180's, Mr. Smith, can you tell me what records Cordova Airlines customarily keeps with regard to individual Cessna 180 aircraft?

A. Well, you have your log books.

Q. Now, with reference to log books, would you describe a log [5] book for me a little bit and tell me what goes in one?

A. Well, our log books are something about the size of this tablet. It's a 7x14 and made in duplicate and you have your time there and you carry your time forward in each column from day to day. You retain the second copy, which is a yellow copy, at all times in the log book and the white

(Deposition of Merle K. Smith.)

copy is retained in the maintenance shop and they're numbered in serials and you must not destroy them.

Q. Are the copies made by means of carbon paper? A. Yes.

Q. And whose duty is it to keep the log?

A. It's the pilot's.

Q. Do you know whether or not a log was kept on the Cessna 180 that crashed?

A. Yes, there was a log kept.

Q. Do you know where the log is now?

A. I don't really know where that log is right at the minute, I don't.

Q. Do you recall ever having seen that log?

A. I did see that log in the CAB office.

Q. Where?

A. In Anchorage in the Loussac-Sogn Building.

Q. Which copy of the log was it that you saw?

A. Well, it was just a whole book.

Q. I see, and then your maintenance department would have the [6] white copy of the log?

A. Yes, if the pilot had mailed those into him. See, the maintenance for this particular airplane is in Cordova and he would mail those in periodically.

Q. Would your maintenance department in Cordova have at the present time the white copy of the log on this aircraft?

A. I just don't know.

Q. Would you be willing to check with your

(Deposition of Merle K. Smith.)

maintenance department in Cordova, say on Monday, and see if that document is available?

A. Yes.

Q. Can you tell me how the CAB happened to get the yellow log on this aircraft?

A. Well, they always make the inspection after a crash and take all the records and usually including the records that the operator has on hand.

Q. Do they customarily return those records when they have completed their investigation?

A. I think they do. After they're through with them, if you ask them for it, I think they do.

Q. Now, was any portion of the log for this aircraft—strike that. Did Pilot Haley have the yellow log with him when he crashed?

A. The log book I seen, yes, had been with him when he crashed. It was in a metal binder. **[7]**

Q. Was it seriously damaged in the crash?

A. Well, yes, the metal was rolled up as we refer to it as a pretzel, just kind of rolled up.

Q. Were the entries still legible?

A. I believe maybe they were.

Q. Did you actually look at the log yourself?

A. Not too much, not—I mean I never tried to determine whether anything was readable or not—just general discussion.

Q. You did, I am sure, examine the log however with respect to entries that Pilot Haley made on the day of the crash, did you not?

A. No, I don't think I did.

(Deposition of Merle K. Smith.)

Q. Now, I believe you said that the time would be entered in the log? A. The flight time, yes.

Q. By flight time, you mean the actual time the aircraft is in the air?

A. Well, yes, from the time—you have flight time and you have block time. Your block time starts from the time you start the motor and your flight time starts from the time your wheels leave the ground. That is usually entered—or times off, they write down their stuff like that.

Q. And those are listed separately in the log?

A. Well, yes.

Q. Now, what ever information goes in the [8] log?

A. Well, on the aircraft log, the pilot writes what we call squawks, which is, if you have a rough "mag"—magneto, and if the radio isn't working or needs some repair, he writes that and then when it's repaired by an A & E, or fixed, why he signs off and initials who done it.

Q. For the record, what do you mean by an "A & E"?

A. Licensed airplane and engine mechanic. A & E means aircraft and engine.

Q. And who licenses these fellows?

A. The CAA.

Q. Now, does the pilot also insert in the log a record of what trips he makes and what he carries?

A. From and to—like from one point to a point

(Deposition of Merle K. Smith.)

and on. He inserts that. He don't on the aircraft log—they do not, I don't think, insert the load.

Q. Does—you don't think he inserts number of passengers or amount and type of cargo?

A. I believe maybe there is a column in there for number of passengers and there could be a freight column on there, too. It's very possible that there is a——

Q. Now, in addition to the log book, what other records are maintained by Cordova in respect of a Cessna 180?

A. Well, you have your log books and all your repairs and alterations which are a CAA form that you have.

Q. Is that form called a Form 337? [9]

A. Yes, that is the maintenance form.

Q. That is the designation of it? A. Yes.

Q. Do you keep files of those forms?

A. Yes.

Q. Does Cordova have a file of Form 337's on this particular aircraft? A. Yes.

Q. Can you tell me where that is?

A. Well, it's either in my file or my attorney has it.

Q. Have you seen that file recently?

A. Not recently. I mean, the last six months which—we had, say, sometime previous to that, yes.

Q. Where was it when you saw it last?

A. I believe it was in my attorney's office.

(Deposition of Merle K. Smith.)

Q. Was the file of Form 337's complete, that is, it showed repairs and maintenance right up to the end on that aircraft? A. Yes.

Q. What other records did you keep on this particular aircraft?

A. Well, that is about all you are required to keep is your log books which are supposed to give you a complete maintenance record and flight record and then your CAA forms like your 337's and for repairs and alterations and then forms on your motor overhauls and your motor changes and stuff like that, which is also 337. [10]

Q. Well, in addition to Form 337's, and log, are there any other records that Cordova kept on this aircraft?

A. Not—I don't think so. I don't think we keep any other records on the maintenance and the operation of the aircraft; that is about all we keep.

Q. Very well. Now, on December 18, 1955, the day of the crash, do you know what work this aircraft did for Morrison-Knudsen?

A. Do I know now what it was doing?

Q. Yes.

A. I do know now what it was doing.

Q. What was it doing?

A. According to my information, it was flying from what we refer to as Pile Bay to Big Mountain.

Q. Where is Pile Bay?

A. Well, that is at the head of Iliamna Lake,

(Deposition of Merle K. Smith.)

which is at the end of the portage, where the portage—across from Cook Inlet to Iliamna Lake.

Q. Was it carrying cargo or passengers on this date?

A. My information is it was carrying cargo.

Q. What kind of cargo? A. Dynamite.

Q. What kind of dynamite, if you know?

A. I don't know.

Q. Did you ever examine the scene of this crash?

A. I didn't, no. [11]

Q. Do you have any information concerning how this dynamite was packed?

A. I don't know.

Q. Do you have any information concerning how much dynamite was being carried?

A. I don't.

Q. How many trips did the aircraft make that day?

A. I believe that my representative told me that they made—that he was on his second trip for the day. I believe that, now, I don't really know. It might have been his first trip.

Q. Do you know where the pilot—at what point the pilot started, when he commenced that day's work, was he at Big Mountain, or, was he at Pile Bay or someplace else?

A. I have heard that he stayed the night before at Big Mountain.

Q. Where did the Pilot Haley obtain gasoline for his plane?

(Deposition of Merle K. Smith.)

A. Well, I have been told that he gassed at Big Mountain the night before.

Q. Could you tell us who told you that, if you remember?

A. Well, I think it was my representative down there, or the CAA who kind of reconstructed his past twenty-four hours alive, or the people of Iliamna advised them, or at Big Mountain advised them that he had stayed there the night before.

Q. And that he had gassed up the night before?

A. Yes, I think somebody said they had seen him gassing. [12]

Q. Do you know whether or not when he gassed up he filled his tanks?

A. I don't really know that. We tried to determine that, but there was no information that we could ever find just what he had done.

Q. Did Cordova have any policy about whether or not the pilot, gassing up under circumstances of this kind, taking into account the weather and time of year, would fill—normally fill his tanks completely?

A. No, we required them to be able to go to their destination plus forty-five minutes of additional gas. In other words——

Q. So, that if he had less than that amount of gasoline, that is, enough to go to his destination plus forty-five minutes—— A. Yes.

Q. (continuing): ——he would he would then have been in violation of your company rules?

(Deposition of Merle K. Smith.)

A. Would you repeat that, please?

Q. I am putting words in your mouth a little bit here.

Mr. Nesbett: I will object to the leading nature of the question.

Mr. Talbot: For the record, I will state, of course, that Mr. Smith is president of the Plaintiff Corporation and therefore, I feel, under the rules, that I have the right to lead him. However, you should, as you have, note Mr. Nesbett's objection. I will withdraw that question any way. [13]

Q. (By Mr. Talbot): To your knowledge, does the CAA have any regulations about how much, which would affect the amount of gasoline which Pilot Haley should have had on board when he started out his first trip on this day?

A. I don't believe there is any CAA regulations on small aircraft regarding the amount of gas.

Q. Do you know whether the Pilot Haley had been engaged in transporting dynamite from Pile Bay to Big Mountain on days previous to the day of the crash?

A. Did I know it then when the airplane was cracked up?

Q. No, do you know it now?

A. Yes, I know it now, yes.

Q. Did this aircraft have any ropes or lashing or other means of tying down the cargo?

A. Well, yes, uh-huh.

(Deposition of Merle K. Smith.)

Q. Do you know whether the cargo was tied down at the time of the crash?

A. No, I don't.

Q. Do you know whether it had been tied down at the beginning of that flight?

A. No, I don't.

Q. What kind of landing gear did this Cessna 180 have on it when Cordova bought it?

A. We—when we actually purchased the airplane, it was on floats. [14]

Q. Then was some other type of landing gear subsequently installed?

A. Yes, we got the landing gear and the wheels and I believe we had it on skis and then we had it on ski wheels.

Q. What kind of landing gear was on it when it crashed?

A. It was what we call a combination ski wheels, a Federal ski wheels.

Q. Is Federal the name of the company that manufactures that kind of gear? A. Yes.

Q. Is that a standard authorized landing gear for Cessna 180?

A. Yes, the ski wheels are an approved ski wheel.

Q. The particular ski wheel that was on the aircraft was an approved one? A. Yes.

Q. When was the ski wheel landing gear installed?

A. Well, that was installed just prior to the

(Deposition of Merle K. Smith.)

airplane's departure from Cordova to Bristol Bay or to Iliamna.

Q. Just before it started this job for M-K?

A. Yes.

Q. I have never seen a ski wheel arrangement. Would you describe for us what sort of landing gear it is?

A. Well, you have your standard wheels that come on the airplane and then you have your skis with the control in the cockpit that the pilots can, if they want to, land on snow or ice and use his skis. He pumps them down so that the skis protrude [15] below the wheels and then he—when he wants to land on a straight hard runway, he can pump them up, you see, and that's the term ski wheels.

Q. Can you tell us how much weight is added to the weight of the aircraft, empty, by the addition of this sort of ski wheel arrangement over and above the normal wheels?

A. By gosh, I just can't tell you that.

Q. Can you tell us approximately?

A. Well, I imagine it would be—the skis and installation would weigh someplace—I will just make a guess between fifty and one hundred and ten pounds.

Q. When the skis were added to the wheels, if I may put it that way, was this alteration approved by CAA?

A. As far as I know, it was. I happened to be

(Deposition of Merle K. Smith.)

in Cordova during that installation and it was installed exactly by the blueprints and we did part of it at night, in the evening, and I worked on it a little myself. I was around there.

Q. Who furnished the blueprints?

A. They come with the skis from the factory.

Q. And do you remember who the mechanic was that actually installed them?

A. Yes, our shop man there, Bob Albers, Robert Albers.

Q. Is he still available?

A. Yes, he still has the same capacity with the company.

Q. In Cordova? [16] A. Yes.

Q. What would the normal procedure be for Mr. Albers by way of getting CAA approval after he had completed installing the skis?

A. Well, he makes out his 337 and signs it off as having done the work in the approved fashion as approved by the CAA and the blueprints and then it's presented to the CAA for their approval or signature.

Q. Who, specifically, in CAA would it be presented to?

A. Well, we are assigned certain inspectors and they change and I believe at that time, that we were assigned Mr. Rodgers.

Q. Did Mr. Rodgers live at Cordova?

A. No, he's Anchorage.

(Deposition of Merle K. Smith.)

Q. And how would the 337 have been submitted to Mr. Rodgers—by mail?

A. No, in this particular case, the airplane was flown to Anchorage on a ferry and presented thru our people at Anchorage, our maintenance people at Anchorage. They presented the papers and the airplane to Mr. Rodgers for inspection.

Q. Would the CAA inspector in this case, Mr. Rodgers, have indicated his approval on the Form 337?

A. With scheduled airlines, they have certain people sometime that can do that, you see; under certain circumstances, some of your top maintenance men, your inspectors, your superintendent maintenance can do that. It's strictly up to our designated maintenance inspector, which in this case was Mr. Rodgers. [17]

Q. Mr. Rodgers would determine then who the individual was that would make the final inspection?

A. Well, he would determine beforehand, probably several months before, who could sign off the 337's for us.

Q. I see. Then, the approval or disapproval of the CAA on this particular Form 337 would appear right on the form itself, would it not?

A. No.

Q. Well, I thought you said—I may have misunderstood you, but I thought you said that the Form 337 is submitted by your mechanic and then

(Deposition of Merle K. Smith.)

the Form 337 is signed off by the designated CAA official? A. That is right.

Q. So——

A. But, you also have people in your organization—sometimes he will say you can handle that yourselves.

Q. In other words, he might say Mr. Smith can approve it, for example?

A. Well, not on the spur of the moment like that. You see, what they do is set up within your organization and prove, and give you approval—certain people that can sign something off, you see, that——

Q. I see. Did you have such a person in your organization who had been designated by CAA at that time?

A. Well, I don't really know. I am sure we had, or if we didn't [18] have, why, it was—there was something worked out with Mr. Rodgers there on it at that time. I didn't come over to Anchorage; I stayed in Cordova and I knew the airplane landed here with all the paper work and our maintenance people here took it over and went through whatever steps were necessary.

Q. You have then, a maintenance force here in Anchorage as well as at Cordova?

A. Yes. The maintenance people in Cordova handle small aircrafts, Cessna 180, or bush operations. It's all out of Cordova; and large aircrafts here. If you have something going on in Anchor

(Deposition of Merle K. Smith.)

age, why, they handle it for the maintenance people in Cordova, you see.

Q. Now, Mr. Smith, does CAA, by regulation, set a legal load limit on aircraft of this kind?

A. Yes, they have a gross weight and empty weight and useful weight. Your gross weight is your total weight, including your—everything.

Q. Gross weight then is cargo, pilot, gasoline and all? A. That's right.

Q. And what is net weight?

A. Your net weight is usually your empty weight, what the airplane weighs without anything in it, only just air frame and engine——

Q. Well, wouldn't——

A. ——radios and such all.

Q. Equipment would be included? [19]

A. Yes, that's right.

Q. How about gasoline? A. No.

Q. No gasoline included in the net weight?

A. No.

Q. Net weight then assumes absolutely empty gas tanks? A. That's right.

Q. How much gasoline does a—strike that. How much gasoline did the tanks have, this particular Cessna 180 hold at the time of the crash?

A. I believe that those are thirty-six gallon tanks and there is two of them. That would make a total of seventy-two. I could be wrong on that. There could be two 18 gallon tanks, but some place or other it sticks in my mind there's thirty-six gallons there some place or other.

(Deposition of Merle K. Smith.)

Q. Now, had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?

A. No.

Q. No additional gas tanks had been added?

A. No tanks added.

Q. None had been taken out?

A. None taken out.

Q. My information, Mr. Smith, is that the total capacity is sixty gallons—one of us is in error but it's a point which I am sure can be checked, but——

A. Well, you could be right. There's so many of those that—like your Widgeons and everything operating. I just don't remember. It could be two 30 gallon tanks.

Q. Let's assume that it is two 30 gallon tanks with a total gasoline capacity of sixty gallons. Of that sixty gallons, how much would be usable in normal flight?

A. I believe you can get right down to the last drop in normal flight on the Cessna 180.

Q. You mentioned that Cordova is a scheduled airline? A. Yes.

Q. What do you mean by that, sir?

A. Well, we are certificated for mail, passengers, freight, over certain routes and certificated to do other sort of charter and contract work and they call them "skeds" and "non-skeds" and so on. We are referred to as a certificated scheduled airline.

Q. How long have you been a scheduled airline?

(Deposition of Merle K. Smith.)

A. Well, practically from the day that we were first incorporated, 1934, but we came under the present schedule laws in 1938—the Civil Aeronautics Act in 1938.

Q. And you have been under that same law and regulation ever since? A. That's right.

Q. Now, referring to the year 1955, are you familiar with the fact that the CAA then had in effect regulations concerning the carrying of explosives by aircraft of the scheduled airlines?

A. The CAB is the one that makes those.

Q. Those were CAB regulations?

A. Yes, I am aware of that.

Q. Was the carrying of dynamite by this plane on the day in question under the regulations then in force, in violation of CAA regulations with respect to the carriage of explosives?

A. The regulations in force—it was not in violation.

Q. It was not in violation? A. No.

Q. Had those regulations been changed shortly before the crash or do you know?

A. Well, I'm sorry, I don't even know that order number, but it was, I'd say, several months, at least two months, maybe, before that that they came out.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was was had.)

Mr. Talbot: On the record.

Q. (By Mr. Talbot): Mr. Smith, I hand you a

(Deposition of Merle K. Smith.)

copy of a special civil regulation No. SR-417 of the United States Civil Aeronautics Board and ask you if that is the regulation or order to which you referred? [22]

A. No, that isn't the one that I am talking about. This was the subsequent order to the one that I'm referring to.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Q. (By Mr. Talbot): Mr. Smith, I hand you a certified copy of CAB Order No. S-712, dated December 2, 1955, and ask you if that is the order to which you refer?

A. Yes, uh-huh, this is the one.

Q. Is it your understanding then that prior to the promulgation of this order No. S-712, that the carrying of explosives was prohibited by CAB, but tha this order made it possible for you to carry explosives under the terms of the regulation—of the new regulation?

A. This order clarified that as far as we were concerned, it clarified it. Before that, the—previous to this order, why, it was not—I don't think—in violation, but there seemed to be a feeling that there was no regulation.

Q. Prior to—— A. Prior to this order.

Q. Had your airline flown explosives prior to this order?

(Deposition of Merle K. Smith.)

A. Oh, a small amount, yes. This order came about thru the Air Force.

Q. Prior to the promulgation of this Order No. S-712 had your airline ever applied to CAB or CAA for special permit to carry explosives on a given flight? A. That, I don't know.

Q. Did Cordova Airlines apply for a special permit to carry explosives on the flight on which Pilot Haley crashed? A. No.

Q. Did Cordova Airlines apply for a special permit for carrying explosives on the previous flights that Pilot Haley had made for M-K carrying explosives from Pile Bay to Big Mountain?

A. We had not. We didn't even know he was hauling dynamite.

Q. It's my understanding, Mr. Smith, that you had a policy of insurance on this aircraft, is that correct? A. Yes.

Q. How much was it insured for?

A. I think the policy was the aircraft was insured for $15,000.00, with some possible deductions; I don't remember what they were.

Q. Who arranged to secure this insurance? That is, who in Cordova Airlines arranged it?

A. Our office manager.

Q. What's his name?

A. Joe Kiel. He's no longer with us now.

Q. Where does he live now?

A. That, I'm not positive. He worked for Federal Electric for a while and then he moved Stateside and I don't know just where he went. [24]

(Deposition of Merle K. Smith.)

Q. Do you expect to have Mr. Kiel as a witness at this trial?

A. I haven't heard of it. To clarify my previous statement there, he arranged for all the policies. They were all brought up and talked over with me before we actually bought the insurance, so to speak.

Q. The terms were discussed with you?

A. That's right, and good and bad points of a policy and the cost and so on.

Q. Do you remember if you participated particularly in the placing of this particular policy of insurance?

A. Well, we were insuring a whole fleet at that time and we took them on a, you know, just as a group coverage, you might say. We had every airplane we owned insured at the same time.

Q. Do you know how Mr. Kiel went about placing this particular insurance?

A. Yes, we contacted different brokers and got what we call quotes from them, which they in turn, I guess, got from the underwriters.

Q. Did you get a quote from a firm here in Anchorage known as Coffey-Simpson?

A. Yes, we did.

Q. And was this insurance eventually placed thru them? A. It was.

Q. Did you personally have any discussions with any official or employee of Coffey-Simpson concerning the terms and provisions of this particular policy of insurance—that is, you——

(Deposition of Merle K. Smith.)

A. Oh, yes, I talked to Louie Simpson quite a bit about it.

Q. Did you talk to anybody else in the insurance business? A. Other than Coffey-Simpson?

Q. Yes.

A. Oh, yes, we had a broker from the States.

Q. Who was that?

A. That was Don Flowers — Gailbreath & Flowers.

Q. Are you familiar with an insurance firm called Northwest—strike that. Are you familiar with an insurance firm called Far West General Agency of Seattle?

A. I'm not too familiar with Far West. D. K. McDonald, I think, was the people that I was familiar with, who might have been Far West, and I understand they were.

Q. But in any event, you didn't talk to anybody from D. K. McDonald or from Far West?

A. No, we only talked with the local broker.

Q. Cordova Airlines has sued Far West General Agency, Mr. Smith, as a defendant in this action. Please tell us in your own words just what the nature of your claim is against Far West Agency?

A. Well, we feel that we should have the amount of our claim; in other words, what we had insured it for. [26]

Q. Do you feel that you were issued and received the insurance coverage that you ordered?

A. Well, at the time that I—I mean, I have

(Deposition of Merle K. Smith.)

always felt that the insurance policy was what we wanted and what we discussed about.

Q. You just wished that the underwriters would pay for the loss in accordance with the terms of the policy, is that a fair statement?

A. Well, the terms of the policy, the way you interpret them, and the way I interpret them could be different.

Q. But, the way you interpret the policy, you are entitled to be paid? A. That's right.

Q. But, you don't find any fault with the policy itself; that is, with the way it's written or the provisions it contains.

Mr. Nesbett: I object to the leading nature of the question.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Mr. Talbot: On the record.

Q. (By Mr. Talbot): Would you please answer the question, Mr. Smith?

Mr. Nesbett: Before you answer, I will object further on the ground it was not a question; it was simply a statement to the witness.

Mr. Talbot: May I have the question read back, please?

(Thereupon, the Court Reporter, read back the question on Page 27, Line 14.)

Mr. Talbot: I withdraw that question.

Q. (By Mr. Talbot): Mr. Smith, is there any

(Deposition of Merle K. Smith.)

term or provision that you ordered or coverage which you ordered which was not contained in the policy which you actually received?

A. Well, from the way I interpreted it, no.

Q. Do you remember seeing this particular policy before the crash? A. No, I don't.

Q. You have, of course, insured several other Cessna 180's, have you not? A. Yes.

Q. Have you examined the policies with regard to any of those aircraft?

A. No, I don't think so; not the fine print.

Q. At the time this insurance was placed, Mr. Smith, was it not your understanding that the aircraft had to be operated in accordance with CAA regulations applicable to it; otherwise, this would affect the insurance coverage?

A. Well, that is generally understood you operate within the prescribed regulations.

Q. And that if you don't operate within regulations, it voids your insurance. [28]

Mr. Nesbett: I will object to the leading nature of the question which is not a question and on a further ground, it's a statement to the witness and not a question.

Mr. Talbot: May I have the question read back, please?

(Thereupon, the Court Reporter read back the question on Page 28, Line 24.)

Mr. Nesbett: I object on the further ground that it calls for a conclusion of the witness with respect to the very issues before the Court, and that he is

(Deposition of Merle K. Smith.)

incompetent to answer the interpretation of the policy. Go ahead.

A. Well, not necessarily, but——

Q. (By Mr. Talbot): Would you explain your answer, please?

A. You don't—in this business, you buy insurance; you expect to be protected. You do the best you can at all times to keep your operation within the prescribed regulations.

Q. Do you expect your insurance to protect you if those regulations are violated in the operation of the aircraft?

Mr. Nesbett: Object again on the same ground, that it calls for a conclusion of the witness and the question is leading and the witness is not competent to answer, that it calls for a statement from the witness on an issue which is before the Court. Go ahead.

A. I think I understand your question now. Could I get it read back, please? [29]

Mr. Talbot: You bet.

(Thereupon, the Court Reporter read back the question on Page 29, Line 17.)

A. Yes.

Q. (By Mr. Talbot): Is it your testimony, then, that Cordova Airlines takes the position that this claim should be paid regardless of whether CAA regulations were observed or whether they were violated on the day in question, with respect to the operation of this aircraft? A. I do.

(Deposition of Merle K. Smith.)

Q. Did Cordova send some representative to the scene of the crash to investigate?

A. Yes, we sent our Chief Pilot down.

Q. Who is that? A. Graham Mower.

Q. Could you spell it for us, please?

A. M-o-w-e-r.

Q. And his first name? A. G-r-a-h-a-m.

Mr. Talbot: Off the record.

(Thereupon, an off-the-record discussion was had.)

Q. (By Mr. Talbot): Going back just for a minute, Mr. Smith, to the question of how much weight a Cessna 180 can carry and still be within the legal limits set by CAA. We talked about empty weight and gross weight, and I believe you said "useful weight." Did you use that expression?

A. Useful load, yes.

Q. What's useful load?

A. Well, that's the difference between your gross weight and your empty weight.

Q. And that would include what items, in useful load?

A. Well, your gas, your pilot, and your pay load.

Q. I suppose survival gear for the pilot, would that be part of the useful load?

A. Emergency gear.

Q. Emergency gear?

A. Well, that varies, sometimes that is in the empty weight and sometimes it's in some—different companies handle it different.

(Deposition of Merle K. Smith.)

Q. With regard to this particular Cessna 180 on wheels, what would be the useful load capacity?

A. I don't know—I just can't answer that because I don't know.

Q. Do you know, approximately?

A. No, I don't.

Q. You don't have any idea? A. No.

Q. Who computes the useful load?

A. Usually your maintenance people. [31]

Q. Did they compute it for this Cessna 180?

A. Yes, they do for all aircraft.

Q. Well, do you know whether they did for this particular one? A. Well, I presume they did.

Q. Did they compute it after the skis were installed?

A. I believe that would be on your 337.

Q. But, you don't know whether that was, whether it was recomputed or not?

A. No, I don't.

Mr. Talbot: You may examine.

Mr. Nesbett: No questions.

/s/ MERLE K. SMITH,

[Endorsed]: Filed May 28, 1958

In the District Court for the District of Alaska
Third Division

No. A-12,349

CORDOVA AIRLINES, INC., and NATIONAL BANK OF ALASKA, a Corporation,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON, FARWEST GENERAL AGENCY AND COFFEY SIMPSON AGENCY, INC.,

Defendants.

Before: The Honorable Harry C. Westover,
U. S. District Judge.

TRANSCRIPT OF PROCEEDINGS
Anchorage, Alaska
May 29, 1958—10:00 o'Clock A.M.

Appearances:

For the Plaintiff:
BUELL A. NESBETT,
Attorney at Law,
Anchorage, Alaska.

For the Defendant:
ARTHUR D. TALBOT,
Attorney at Law,
Anchorage, Alaska, and
JAMES E. FISHER,
Attorney at Law,
Anchorage, Alaska.

The Court: I see some other counsel. Do I have another case here?

Mr. Talbot: Your Honor, Mr. Nesbett and I, who are counsel in the Cordova Airlines case, along with Mr. Fisher, were advised by the Calendar Clerk that our Motion for Production of Documents and, I believe, Motion to Amend the Complaint would be heard at this time.

The Court: Well, you know, you didn't put any time on your Motion and I forgot it was coming up here.

Mr. Talbot: I think I did, your Honor, when—I set the time—the time that I put on it was 2:00 o'clock this afternoon, but the Calendar Clerk called and said that you wanted that moved up to 10:00 o'clock.

Now, your Honor, there are some other matters of vital——

The Court: Well, let me get the file, will you please. Mrs. Sperry, will you run in on my desk and get the files?

(Thereupon, the Deputy Clerk complied with the Court's request and the following proceedings were had:)

The Court: Well, I take it back; you know, this does show 1:30. Well, this is as good as 1:30, we can dispose of the matter now.

Mr. Talbot: Your Honor, if I might explain: Mr. Nesbett and I spent about an hour and a half together yesterday [3*] and we have agreed on some

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

eleven stipulations with regard to facts and pleadings. We have agreed to almost completely revamp the pleadings to add three additional parties, to take two parties out of the case and in addition, your Honor, I am—I sincerely believe that our big defense in this case which is our allegation that this plane was carrying dynamite in violation of applicable CAA regulations and in violation of the terms of the policy. The carrying of dynamite is admitted in the pleadings and in a deposition which we have. I sincerely believe that those are questions entirely for the Court and a matter of interpreting the policy and the applicable regulations and I believe that if we could have a pretrial conference that it might be possible for your Honor to dispose of the entire case.

The Court: Well, we will have one right now. I am glad you are in because I was going to find out what this case was about if I could.

Mr. Talbot: Mr. Nesbett represents the Plaintiff. I will yield to him. Oh, your Honor, might the record show that Mr. James E. Fisher is present in court and that he is associated with me as counsel for the Defendants in this case?

The Court: The record may so show.

Mr. Nesbett: Your Honor, I am representing the Plaintiff. However, I was called in on these motions made by the Defendant, but since Mr. Talbot——

The Court: Well, now, before we get to the motions, [4] have you got the original policy here?

Mr. Talbot: No, I don't believe either side has the original policy, but——

The Court: Well, all right. Have you got any copy of the policy that you can stipulate to?

Mr. Talbot: The original—the policy in question is annexed as Exhibit A to the Plaintiff's complaint with two exceptions. Exhibit A did not have on the back thereof the conditions of the policy which simply is a failure to photostat both sides of the face sheet and Mr. Nesbett will stipulate with me this is the face sheet which actually constituted part of the certificate and the Court may consider that its terms were terms of the certificate.

The Court: Mr. Nesbett, will you stipulate that Exhibit A is the policy?—or, is a copy of the policy?

Mr. Nesbett: Yes, your Honor.

The Court: And will you stipulate that——

Mr. Nesbett: Plus the face sheet that will be passed up to your Honor, yes.

The Court: All right. That may be received. I think the Exhibit and this document here (indicating) may be received as the Plaintiff's Exhibit—as either the Defendant's or Plaintiff's Exhibit—which is it?

Mr. Nesbett: That would be Plaintiff's Exhibit.

The Court: All right, Plaintiff's Exhibit [5] One.

PLAINTIFF'S EXHIBIT NO. 1

This is to Certify That

Farwest GENERAL AGENCY

In accordance with authorization granted by certain **UNDERWRITERS AT LLOYD'S, LONDON,** whose names and the proportions underwritten by them are or will be on file in the office of said Farwest General Agency and also on file in the office of Messrs. C. E. Heath & Co. Ltd., London England, such Underwriters and/or Companies being hereinafter called Insurers, has procured insurance as hereinafter specified for the persons named herein in respect of the coverage specified and on the terms set forth in and/or attached to this certificate. Pursuant to such authorization the Insurers do hereby bind themselves, each for his own part and not one for another, as follows:

Certificate No **A-12732-178**

Renews No **A-12356-179**

Agent **Coffey-Simpson Agency**

SCHEDULE

1. Name of Assured: **CORDOVA AIRLINES, INC.**

   Address of Assured: **ANCHORAGE, ALASKA**

3. Certificate Term From **October 24, 1955** To **October 24, 1956**
   12:01 A.M. standard time at the address of the named assured as stated herein.

4. Assured's Business or Profession is: **SCHEDULED AND NON-SCHEDULED AIRLINE**

5. Assured's interest in the Aircraft is that of **OWNER**

6. Description of Aircraft, Value(s), Limit(s) of Liability, Premium(s)

Aircraft Identification Mark and Number Column 1	AIRCRAFT MAKE AND MODEL Column 2	YR OF MFR Col 3	TYPE Column 4	PAX CAP (Dual Cmds) Col 5	ENGINE(S) MAKE AND H.P Col 6	AGREED VALUE Col 7

It is understood that 30.93% (Part of 100%) of the coverage expressed herein is subscribed to by Underwriters at Lloyd's, London; and their liability is limited to the same percentage of the limits expressed herein.

- - - - - - - - - - - - - -SEE ENDORSEMENT NUMBER ONE - - - - - - - - - - - - - -

AIRCRAFT IDENTIFICATION MAKE AND NUMBER Column 8	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT: Flight risks not insured unless amount of deductible entered in column 9 hereunder. Deductible Flight Risks Column 9	Premium Charge Column 10	SECTION 2—THIRD PARTY LIABILITY LIMITS OF LIABILITY: COVERAGE A PUBLIC LIABILITY (Excluding Passengers) One Person Column 11	One Accident Column 12	COVERAGE B PROPERTY DAMAGE One Accident Column 13	COVERAGE C PASSENGER LIABILITY One Person Column 14	One Accident Column 15	PREMIUM CHARGE Column 16

- - - - - - - - - - - - - - - - - - SEE ENDORSEMENT NUMBER ONE - - - - - - - - - - - - - - - - - -

$ $

7. Pilots: Pilots holding a valid pilot's airman certificate and proper ratings issued by the Civil Aeronautica Authority for the type of aircraft flown and the kind of flying performed.

8. Purposes for which Aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.

9. Geographical Limits: United States, Canada, Alaska and not exceeding 100 miles into Mexico.

United States Internal Revenue Documentary Stamps in the amount required and applicable to this insurance have been affixed to the office records of this Certificate retained by Farwest General Agency.

The law provides for no federal tax refund once the insurance attaches.

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Insured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States, and will comply with all requirements necessary to give such Court jurisdiction, and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon

Wm. Renfrew, Anchorage, Alaska

and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and upon the request of the Insured to give a written undertaking to the Insured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured or any beneficiary hereunder arising out of this contract of insurance, and hereby designate the above named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

October 24, 1955
Seattle, Washington

Farwest GENERAL AGENCY
By s/ Thomas Telfer

Mr. Talbot: Your Honor, we originally had a dispute about Rider No. 6 of this policy, but that dispute has been eliminated by further stipulation.

The Court: Well, now, let's get the policy before the Court.

Mr. Talbot: All right. I hand a copy of the face sheet to the bailiff.

(Thereupon the document was presented to the Court.)

The Court: Now, will you point out to me in the policy the clause relative to carrying dynamite?

Mr. Talbot: Yes, your Honor. There are two clauses; both under General Exclusions, about the middle of the page. The General Exclusions section provides this certificate does not cover any loss, damage or liability arising from "(c) any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

Now, that is one of our defenses. We claim that they should have had a waiver from CAA; that they didn't get a waiver from CAA and that they didn't get the written consent of Farwest General Agency for the insurers.

The Court: Well, now, just a minute. Mr. Nesbett, do you agree that a waiver was required?

Mr. Nesbett: No, your Honor, and that brings us back to the motion. They have moved that at [6] this time and want your Honor to rule this morning on whether they can assert the lack of waiver as a fourth and separate affirmative defense and that is

something your Honor will have to rule on before they can, in my opinion, rely on the specific waiver of—provision of the policy.

The Court: All right. Now, where is—is there another clause?

Mr. Talbot: The other clause on which we rely is General Exclusion No. 4; namely, the use of the aircraft for an unlawful purpose.

The Court: Well, now why was the aircraft used for an unlawful purpose?

Mr. Talbot: Because the purpose of this flight was carrying contraband in effect; that is, dynamite in violation of the law.

The Court: Well, wait a minute. Isn't it lawful to carry dynamite in a plane?

Mr. Talbot: It was not, your Honor at that time and under those circumstances, and Section——

The Court: May I inquire, was this a passenger plane or freight plane?

Mr. Talbot: It was being used as a freight plane, your Honor.

The Court: And you say it was unlawful to carry dynamite on a freight plane? [7]

Mr. Talbot: Yes, your Honor, and we are prepared——

The Court: Just a minute. Mr. Nesbett, do you agree?

Mr. Nesbett: No, your Honor. There is where we part company, vitally, with Lloyd's.

The Court: Where is your regulation? Let me see your regulations.

Mr. Nesbett: Your Honor, would you hear me

just a moment on that because I think it's going to be the whole core of the case, an interpretation of that clause of the policy because—Mr. Talbot has quoted it right, but it says that the exceptions shall apply and you notice, your Honor, that is an exception—the exception shall apply when the plane is being used for an unlawful purpose with the knowledge and consent of the assured.

Now, your Honor, the fact that, as Mr. Talbot contends, it might have been not in compliance with CAA or ICC rules or regulations in connection with the carriage of dynamite doesn't make the purpose. That is the word I am relying on, the purpose of the flight was to move dynamite from one location to another to construct the radar site for the U. S. Air Force. The purpose of it was not unlawful. The purpose of it was entirely lawful and that is where we will——

The Court: Just a minute, now, do you agree that this dynamite was being carried for the purpose of constructing [8] a radar site or to be used in the construction of a radar site?

Mr. Talbot: Yes, your Honor, indeed we do, but——

The Court: Well, may I inquire now, down where I come from you know you can transport merchandise by truck and by automobile and by railroad and by air, but you up here, many, many times, the only way you can transport merchandise is by air unless you want to revert to a dogsled in the wintertime, but how are you going to get dyna-

mite out to some of these remote areas unless you use a plane?

Mr. Talbot: You do what the criminal statue says you have to do: you go to the CAA and get a permit for the dynamite.

The Court: The criminal statue?

Mr. Talbot: Yes, sir, Section 460 of Title 49 of United States Code declares that it will be unlawful to violate regulations made under that chapter and the concluding sections of that chapter set forth criminal penalties for violations thereof and this is analogous, your Honor, to the cases under the Volstead Act, not to the same degree, I admit, but legally analogous to those cases where a vehicle was being used to transport illicit liquor. I say that under the law and the regulations, this dynamite was contraband. Now, if we are right——

The Court: I don't know how in the world you can say [9] dynamite is contraband if it's being transported from place to place for the purpose of constructing a governmental installation. I don't know how in the world you can say it's contraband, Now, liquor might have been contraband if it was made illegally; dope might be contraband; articles might be contraband, but how in the world dynamite if it's going to be used in the construction of a governmental radar station. I don't know——

Mr. Talbot: I agree with your Honor, that the word "contraband" is probably too strong but my point is that the carriage of a prohibited explosive is unlawful.

The Court: Let me see your regulation that says you can't carry dynamite. Where is your regulation?

Mr. Talbot: We start on that point, your Honor, with Section 49.0 of the Civil Aeronautics regulations which are found in Vol. 14 of the Code of Federal Regulations. Section 49.0 provides as follows: "Explosives or other dangerous articles shall not be loaded in or transported by civil aircraft in the United States or transported anywhere in air commerce in civil aircraft of the United States registry except as provided in this part."

The Court: Well, now that raises another question. That says "United States." Is Alaska the United States?

Mr. Talbot: Indeed, it is, your Honor.

The Court: It's a Territory, but does that regulation [10] apply as to Alaska?

Mr. Talbot: I can refer your Honor, and I will, to CAB regulations specifically applying this section to Alaska.

The Court: Well, maybe Mr. Nesbett will agree. Does the United States include Alaska?

Mr. Nesbett: Sometimes it does; sometimes it doesn't, your Honor. I think in the definition in the Civil Aeronautices Act it says that the word "United States" shall include certain of the possessions and including Alaska. I wouldn't want to be bound by any stipulation at this point in connection with that but that's my knowledge of it at this point.

The Court: Well, you admit, do you not, that you never did get consent, if consent was required?

Mr. Nesbett: No, your Honor, we don't admit that at all.

The Court: Oh, you don't admit it?

Mr. Nesbett: Of course, for the first time this morning, I have learned what they intend to show in connection with their affirmative defenses, but we don't admit that at all. We have certain orders issued by the CAB covering the carriage of dynamite which use the word "any airport in the United States," which of course, under the interpretation I just mentioned of the meaning of the "United States" would include Alaska, which would amount to a blanket exemption in the background. Likewise, your Honor, there is another [11] regulation of the Civil Aeronautics Board which specifically deals with the Alaska situation and names the airlines that can carry dynamite; however, that regulation was issued shortly after this accident, but the first order I mentioned, the blanket order of the CAB was issued prior to the accident. Likewise, there is in the background an interpretation of what is or is not Class A explosives, your Honor; and, lastly, the action of the U. S. Air Force in obtaining any exemption that might have been obtained blanket exemption as an emergency defense measure and last, but not least, the attitude and definitions or advice given by local CAA and CAB officials at the time and in connection with this very sort of carriage in Alaska in interpreting what was Class A and Class B explosives. Actually, if it comes to that, I will show that high CAA officials and the CAA attorneys at that time interpreted the particular type dynamite

that was on this airplane as being a Class B explosive, your Honor, and therefore, even if you take the involved ICC regulations and the Civil Air regulations that he's mentioned, it was considered not to come within the prohibited carriage because under the ICC regulations in the States, it was Class B and could have been carried by rail freight rather than express. You have to go to those definitions to determine what could be flown and what can't; if it could have been flown in rail freight in the States, it's in one classification; if it was prohibited for express in the—under [12] the ICC regulations as prohibited from air carriage without special waiver, your Honor, it's rather involved.

The Court: Well, may I inquire from opposing counsel? Do you agree that there is a difference between Class A and Class B dynamite?

Mr. Talbot: No, between Class A explosives and Class B explosives; but all general dynamite, that is, dynamite containing a liquid ingredient, and indeed, all commercial, popular commercial dynamite in this country is of that type. All that dynamite is Class A and is so defined by the regulations. Now, the next regulation which I have——

The Court: Well, now, read that regulation again, will you—49.0.

Mr. Talbot: 49.0 says: "Explosives or other dangerous articles"— listing some of them not applicable here—"shall not be loaded in or transported by civil aircraft in the United States or transported anywhere in air commerce in civil aircraft

of the United States registry except as provided in this part."

The Court: All right, now, what's your other regulation?

Mr. Talbot: The next section which your Honor, I believe, must consider is Section 49.81 of the CAB regulations. Now that provides as follows: "Prohibited articles. No explosive or dangerous article listed in the ICC Regulations, [13] 49 CFR, Part 72, as an explosive A, a poison A, a forbidden article or as an article not acceptable for rail express (See Section 49.62 for authorization of the carriage of certain radioactive materials), nor any article listed in appendix A hereto shall be carried on aircraft subject to the provisions of this part."

So, by Section 49.81 we have four classes of articles which are prohibited from carriage on aircraft—Class A explosives as defined by the ICC, Class A poisons as defined by ICC, or a forbidden article, which is really contraband, something that will not be accepted under any circumstances for transportation, or an article which you can't ship by railway express.

Now, our position—or, an article listed in appendix A, and they list about one hundred articles in the appendix A, but dynamite is not one of them. But dynamite is—and I will point that out to your Honor—a Class A explosive under the ICC regulations. Now, our interpretation of this section is: that if it's a Class A explosive it's forbidden; if it's a Class A poison it's forbidden; if it's in appendix A it's forbidden and in addition to that, if you can't

ship it by railway express it's forbidden. Now, I expect that Mr. Nesbett will contend that what this section really means is that it's all right to ship a Class A explosive or a Class A poison or an item listed in appendix A if you could ship it by [14] railway express, but that is not the way we read the regulation and we go further than that. We say that you couldn't ship this dynamite by railway express any way. Now, CAB by that section has adopted the ICC classification and regulations on this subject. Now, turning to the ICC regulations, Section 72.5 thereof, and these are found in Volume 49 of the Code of Federal Regulations, Section 72.5 is a long list of commodities and both dynamite and blasting gelatin, which is a species of dynamite, which this was, are both classified as high explosives by this table of the Interstate Commerce Commission and in this same table, your Honor, the extreme righthand column is the column which tells you whether or not the commodity can be shipped by railway express. And I might mention here that the Interstate Commerce Commission makes a sharp distinction between railway express shipments and rail freight shipments. For some reason it is not entirely clear to me but at least there is sufficient difference in the risk and in the handling, in the opinion of the ICC, that they treat rail freight and rail express differently and they devote entirely different parts of the regulations to those two classifications of freight and that's an important distinction because I am willing to concede that these fifty pound cases of forty percent dynamite could have

been shipped by rail freight and indeed, that is how they got here to Alaska, by rail to Seattle and by boat to Seward and then by the Alaska Railroad to Anchorage. And we don't dispute that but we do say that you couldn't ship these fifty pound cases of dynamite by railway express and that, therefore, there is absolutely no possibility that the CAB made an exception which would cover a shipment of this kind. Now, turn to the commodity table under "high explosives," the righthand column says "maximum quantity in one outside container by rail express" and under many of the items it says "not accepted"; that is, you can't ship it by railway express at all, but with regard to high explosives, when you get over in that column to see whether or not you can ship high explosives, which this is, by rail express, they don't say "not accepted;" they say "see section 73.86."

Now, Section 73.86, which in our view is the only allowable way of shipping a high explosive by railway express, has this to say, and Part D, Section D thereof, or sub-section D: "Samples of explosives and explosive articles for transportation by rail freight, rail express, or highway, * * *" and it's a long section, your Honor, but the material part of it is that samples of high explosives may be shipped by rail express provided they are in half-pound lots, separately wrapped and no more than twenty of these half-pound samples in an outside container, so that the maximum amount of a high explosive that could be shipped by railway express would be a ten pound package for laboratory analysis destined

for some governmental laboratory for examination and that is the only way you can [16] ship this stuff by railway express, but here, we have fifty pound cases of dynamite which simply would not have been accepted for railway express. I may have gone too far because as I read the CAB regulation, Class A explosives are prohibited period, and whether or not you could ship it by railway express—I can't believe that in view of the wording of that section, that CAB meant that it's all right to ship Class A poisons or Class A explosives or some item that they list in their own appendix of prohibited articles provided you could get it on railway express. The clear meaning of that section is that they are setting up another—an additional classification of prohibited articles; namely, articles which cannot for one reason or another be shipped by railway express and they insert right in the middle of that clause a reference to regulations having to do with radioactive substances. And the ICC regulations for rail express are full of provisions having to do with the handling of radioactive material and I think that is what the CAB meant. And I think that from the other two regulations, the special regulations which were passed for the Air Force and for Morrison-Knudsen Company and Cordova Airlines in Alaska, that it's perfectly clear when your Honor gets to those regulations that Class A explosives are now and always have been prohibited under Part 49 of the CAB regulations.

The Court: May I ask you a question?

Mr. Talbot: Yes, sir. [17]

The Court: Is your contention that because of the prohibition that you couldn't get the consent to make such shipments?

Mr. Talbot: No, your Honor.

The Court: Do you agree that you could get consent?

Mr. Talbot: Yes, sir. Section 49.71 of the CAB regulations authorizes the Administrator, and I take that to be the head of the Civil Aeronautics Administration, to grant a waiver for a particular flight provided the safeguards therein enumerated are taken.

The Court: Well, now, let's get back for a moment—we are out here in Alaska, a long ways from the Administrator back in Washington. You mean to say you got to go clear back to Washington to get consent?

Mr. Talbot: No, sir; all you got to do is pick up the phone and dial Merrill Field and I am sure that we can show that carriers here have regularly received such waivers for movements of this kind; that there wouldn't have been any trouble or effort at all for Cordova Airlines to have secured lawful authority to transport these explosives.

Now, there's another——

The Court: You agree then that lawful authority to transport could have been obtained?

Mr. Talbot: Could have been obtained, yes, sir, and wasn't. Now, there's another important section in the CAB [18] regulations and that has to do—that section is 49.3b. You see, you have a problem in these cases, your Honor, because a carrier like Cor-

dova to whom a package of explosives is presented, they don't know what's in the package without opening it and maybe making a laboratory analysis; they don't know whether it's forty percent gelatin dynamite or liquid TNT, except perhaps from the label and because of that fact and in order to help the carriers in—the CAB passed this section 49.3b which we claim was also violated. 49.3b provides as follows: "No shipper shall offer, and no carrier or other operator of aircraft shall knowingly accept any explosive or dangerous articles for carriage by air unless the shipper or his authorized agent has certified that the shipment complies with the requirements of this part. No shipment shall be accepted for transportation by passenger carrying aircraft unless the package is accompanied by or shows clearly and plainly, visible statement that it is within the limitations prescribed."

The Court: Well, didn't you agree a minute ago that—or, did you agree that this was not a passenger flying——

Mr. Talbot: That is right; that part would apply.

The Court: ——that this was freight?

Mr. Talbot: That is true, your Honor, but the earlier part of paragraph "b" does apply. That is, that no carrier shall accept a shipment of explosives without a certificate [19] from the shipper, that it complies with these regulations.

The Court: Well, may I inquire, Mr. Nesbett, when the—your client accepted the explosives, did they know they were accepting explosives?

Mr. Nesbett: Probably the pilot, located out in a

remote area at an Alaskan place called Lake Iliamna, when he loaded it aboard probably knew that it was dynamite, your Honor. As to the knowledge of the home office that he was out there flying dynamite at that particular time, no. We have stipulated that—no, we haven't stipulated, but it's stated in the pre-trial memorandum that is going to be presented to you that the airplane belonged to Cordova Airlines, but was chartered to Morrison-Knudsen Company, a large construction firm here; that Morrison-Knudsen Company was a subcontractor to Western Electric and Western Electric was under the contract with the U. S. Air Force to construct these sites. Therefore, Cordova's airplane, the one that was destroyed, was in the custody or in charge of one of its employees and pilot, a person named Herb Haley, and he was on charter out in the bush, as we call it, to do as he was directed and fly as directed by representatives and officials of Morrison-Knudsen Company. Apparently, in the course of his duties out in the bush where he stayed out there flying for this radar site, he was told to, on this particular occasion, to "now haul this dynamite that we have at Lake Iliamna over to the actual radar construction [20] site at Big Mountain," and that he had loaded some aboard and was about to land at Big Mountain when he crashed. However, the dynamite didn't explode as we have stipulated here and the stipulations will be passed up to you.

Now, as to the pilot knowing, I don't know what the pilot knew but certainly, he was an intelligent

man and highly trusted employee and the labels and cartons were no doubt marked. He could have seen them.

The Court: Was the pilot an employee of Cordova?

Mr. Nesbett: He was paid by Cordova Airlines and the airplane was on hourly charter for a ninety day period to Morrison-Knudsen Company under the chain of contracts with relation to what I just mentioned.

The Court: Well, is there anything in that policy that provides that the carrying of the dynamite must contribute to the destruction of the plane?

Mr. Nesbett: It doesn't—of course, dynamite isn't mentioned in the policy.

The Court: All right, the explosives.

Mr. Nesbett: Well, neither are high explosives mentioned, your Honor. The clause they're relying on is No. 4 under the General Exceptions, and they say that this was—this flight was for an unlawful purpose, which, as I mentioned before, is where we part company with Lloyd's on the interpretation. Our contention was the purpose of the [21] flight was entirely lawful. They're contending that a violation, possibly, as they contend of a ICC or CAB regulation made the purpose unlawful. We say the purpose was lawful and then, of course, the clause goes on to say "with the knowledge and consent of the assured."

Now, the assured is Cordova Airlines, Inc.

The Court: Well, if one of the employees of Cor-

dova had knowledge and gave consent wouldn't that be the knowledge and consent of the assured?

Mr. Nesbett: I don't think so, your Honor, but even if your Honor should so hold, you have the other aspects that we mentioned, the waivers in the background which would be a rather involved testimony. The one waiver or rather blanket order made on December of the year of the accident and prior to the accident, we contend is an exemption, in spite of any interpretation you might put on those involved ICC regulations.

We contend that certainly the subsequent regulation, not an order regulation applying specifically to Alaska, clarified and extended the original order which was to apply to all of the United States which includes Alaska under the reading of the Act; and lastly, of course, the advice that was given by CAA officials here and their interpretation of those ICC regulations at that time. That was in 1955. Their thinking was that forty percent gelatin, not being sixty [22] percent was not Class A. The ICC regulations that your Honor will read as a result of this hearing will point out sixty and forty percent, or, rather, up to sixty percent as being Class B and beyond sixty percent as being Class A. This was forty percent. The thought at that time was that no waiver was required in any event, if the—if it was flown by a plane which was carrying only freight which, of course, was the case here.

The Court: May I inquire? Has there been any decisions relative to these matters or——

Mr. Talbot: Yes, your Honor, we relied very heavily——

The Court: All right. What's your citation?

Mr. Talbot: Bruce vs. Lumbermen's Insurance Co., 127 Fed. Sup. 124, affirmed by the Fourth Circuit Court of Appeals at 222 Fed. Sec. 642, a case decided——

The Court: Don't tell me what the case is; I want your citations. I am going to read your case.

Mr. Talbot: Very well. That case in turn was based upon a Supreme Court case. That Supreme Court case is in my brief, your Honor, and your Honor will see that shortly but there is a Supreme Court case on the point and Bruce vs. Lumbermen's was cited with approval and followed by the Eighth Circuit in 1956, in the case of one Globe Indemnity vs. Hansen, 231 Fed., Sec. 895, and the holding of those three cases is that no causal connection need be shown between a [23] breach of regulations—CAB regulations and the casualty itself.

The Court: Mr. Nesbett, have you got any cases you would like me to read?

Mr. Nesbett: I have read both of those cases. I suppose there's no point in arguing them now. Yes, your Honor, I have. Of course, pointing out in those cases, they were dealing with specific exclusions and provisions.

The Court: I will read the cases and I will decide what the cases read. I just want your citations so I can read them.

Mr. Nesbett: There's another line of cases which, of course, hold that no causal connection between

the accident and the carrying of explosives, for example, need be shown and/or rather, that causal connection must be shown in order to prevent a recovery and those cases are represented by cases such as 81 Northwestern, 484; 217 Southwestern, 462.

The Court: That is 462?

Mr. Nesbett: 462, your Honor, and, of course, going back and before any of that argument is applicable, the matter of the definition of the wording "purpose of the flight" is all important. Was the purpose illegal, unlawful? The purpose, we contend that the meaning of that phrase was that the assured must have known and consented to the use of the airplane in flying, as Mr. Talbot phrased it actually, contraband, [24] actual contraband, or flying aliens in and out of the United States, or flying the airplane to accomplish any illegal purpose. The purpose—not the fact that it might have been technically illegal with respect to a flight which was designed to accomplish a good and lawful purpose. There is the difference, and I contend, of course, that must be ruled on before even these cases cited, Bruce vs. Lumbermen's is considered; however, here is a very interesting case, your Honor, two of them and I know your Honor will read them with a great deal of interest and care. They were decided by the Ninth Circuit Court of Appeals, just in the last three years and they involve a policy with the wording almost identical with ours and they involve an airplane accident and they involve, as a matter of fact, one of the defendants, Eagle

Star Insurance Co., and the last decision on that case, your Honor, is reported in 201 Fed. Sec. at page 764. That was the decision of the Ninth Circuit, your Honor, after——

The Court: You say there was another Ninth Circuit case, you said?

Mr. Nesbett: I was just going to say that was a decision after a rehearing on a decision on the same case, reported in 196 Fed. Sec., just a year or so previously—196 Fed. Sec.—well, I haven't the page number, but the page number is given in the 201 citation.

The Court: All right. [25]

Mr. Nesbett: There, the words "due diligence"—of course, there are other clauses in this policy that I am relying on, and "reasonably practicable" and the flight of the airplane under "negligent condition" are all considered.

Now, other authority, your Honor, on the question of—well, that is all I have to cite right at the moment. I will get into the general conditions of the policy, I suppose, later in——

The Court: Well, now, you say you have other clauses in the policy which you rely on. Point them out to me, will you? What is your——

Mr. Nesbett: Now, those are the exclusions. Of course, my whole theory of the interpretation of this insurance policy—I'd like to just tell you about it briefly as a whole, your Honor. If you will look at the face sheet that you have——

The Court: What sheet are you looking at?

Mr. Nesbett: The face sheet that was passed up

to you as part of Exhibit A. Right at the top of the page, Section 1 "Loss or Damage to Aircraft," top of the page.

Mr. Talbot: That's on the back, Mr. Nesbett.

Mr. Nesbett: On the back.

The Court: Well, are you talking about this? (Indicating.)

Mr. Talbot: Yes, and it's the backside of that page, [26] your Honor.

The Court: All right.

Mr. Nesbett: Section One, "Loss or Damage." Now, there in Section A of subsection A of section one it says: "The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except * * *"—now, your Honor, my theory is there are the exceptions to the coverage—"except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown, but including accidental damage caused thereby."

Now, there is the insuring clause of the policy and you will find, your Honor, in reading these Ninth Circuit cases that they concern themselves with that same clause in determining the difference between the exceptions and exclusions and general conditions, all of which we have here in a similar policy. There is the insuring clause with exceptions.

Now, we go down, your Honor, to the next por-

tion of that sheet that I consider applicable and has been pleaded as a defense and look at General Exclusions, and there, your Honor, under No. 4, we come to the Section that has just been discussed here. As a general exclusion they state in the second portion of that sentence, after the use of a semicolon, they [27] say, as an exclusion: "the use of the Aircraft for any unlawful purpose * * *" unlawful purpose, "if with the knowledge and consent of the Assured;"

Now, it's our contention, of course, that the purpose was not unlawful at all. Now, if the purpose was not unlawful, the purpose, that is, of transporting the dynamite from Iliamna to Big Mountain to be used there in the construction of this defense project, then—and they have pleaded it this way—that the carriage of the dynmite was not only a violation of the general exclusion, but it was a violation then of one of the general conditions which follow next; and they mention specifically, your Honor, General Conditions, No. 2, which says, "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA Approved Operations Manual, and in accordance with operations authorized as set forth therein."

Now, if the flight was not for an unlawful purpose, you must and have to revert then to the General Conditions, so in stepping along in the back of this policy to see whether you are covered or not, first, you look at the top and see that you are covered in all situations in flight, or on the ground,

land, or water, except frost, corrosion and so forth. Those are the exceptions that come down and say "here are the general exclusions" and we are only concerned with the accident of whether or not you can call it—call the purpose of this [28] flight unlawful. Then, if not, then you must go down to the section they plead along with the exception and say, "well, then, it was not in accordance with CAA Approved Operations Manual and within Operations Limitations." Now, they have not pleaded it and, of course, I didn't reply to any affirmative defenses, but there is to be considered in connection with that General Condition of No. 2, of course, the following General Condition No. 3, and those are the aspects of a policy of this type that were gone into in such detail by Judge Lemon and Judge Pope in their Washington case.

Where it says, "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2" above "of this Certificate"—do you see that, your Honor?

The Court: Yes, I see it.

Mr. Nesbett: Well, your Honor, the wording of the face sheet of this policy in that section I just read apparently has been changed by Eagle Star and Lloyd's since that lawsuit that appeared in the Ninth Circuit because in that wording in the Ninth Circuit, it was different. Here, they have put a period after the word "policy" and after the words "do and concur in doing all things reasonably

practicable to avoid any loss or damage" they refer specifically to Sections 1 and 2 immediately above. Well, Section 2 requires that the aircraft be operated in accordance with regulations and so on. [29] Now, the meaning of the words "due diligence" as I say, if it was not an unlawful purpose, we must resort to this wording if you are going to bar a recovery. The words say "due diligence and do and concur in doing all things reasonably practicable to avoid any loss * * *" The court considers the words, "due diligence," and they consider in some very small detail, as I recall, the words "concur in doing all things reasonably practicable." There, they have said immediately above that section in No. 2, "it shall be operated at all times, the aircraft, in accordance with Operations Limitations and Manual." It follows up and says, however, in effect, "The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under 1 and 2 above," which refers to Operations Limitations and so forth.

Now, the Ninth Circuit said that those words meant that that—those words referred to negligence. The assured in this case under my theory, your Honor, must have been negligent, if there is any violation of Operations Limitations shown, negligent in not taking the proper steps to have prevented it from happening in the field.

Now there is the whole theory of our case.

The Court: Well, our Reporter probably has

been the hardest working person in the courtroom this morning. I think she ought to have a little recess. She's uncomplaining and goes ahead and does her job and if I don't look after her, [30] nobody else does, so we will now recess until twenty minutes after eleven.

(After a short recess, the following proceedings were had:)

The Court: Counsel, when I so rudely interrupted you awhile ago you wanted to say something, so now this is your time.

Mr. Talbot: Thank you, your Honor. In connection with the Ninth Circuit Court of Appeals decision which Mr. Nesbett cited, that case did indeed interpret almost the identical language of General Condition No. 3 of our policy and on the first hearing the Ninth Circuit held that that provision meant that the Airlines was responsible if the loss resulted from its own negligence and in the second hearing they held that that paragraph was ambiguous and that therefore, it should be interpreted to mean that the Airlines was responsible if they were negligent in preserving the wreck after the crash with resulting loss to the Underwriters. And so we don't rely on that paragraph at all and we haven't pleaded it and we don't believe it's applicable in this case at all. Mr. Nesbett is absolutely right, so far as I can read this policy, with respect to the question of carriage of dynamite only, and not the question of overloading, which is the second

big issue in the case. But on this whole question of the carriage of dynamite, unless we are excused under General Exclusion No. 4, that is, that [31] the Aircraft was used for an unlawful purpose with the knowledge of the assured. If we are wrong, if this was a lawful purpose, for example, or if the assured had no knowledge and didn't give its consent, then we lose on this particular defense.

The Court: Well, now, you say the issue here is overloading.

Mr. Talbot: That is the second issue which neither Mr. Nesbett nor I have mentioned to the Court, yes. That, we believe, is an issue which will have to be tried by the jury in view of the evidence and the questions of facts which are raised. We are in complete disagreement as to how much dynamite was on this plane.

The Court: Was there a limit what this plane could carry?

Mr. Talbot: Yes, your Honor, and we expect to show that and we expect to show as a matter of fact that the—by a preponderance of the evidence, that the plane had on board sixteen cases of dynamite weighing eight hundred and forty-eight pounds and that she was four hundred and forty-eight pounds overloaded, in violation of General Exclusion 1(c) which requires—I beg your pardon—General Condition No. 2 which requires that the plane shall be operated at all times in accordance with its Operations Limitations and Operations Manual. Now, the manual sets forth a way of determining the legal useful load of the aircraft and we

are going to have to [32] have, it seems to me, some expert testimony on that point as to what was the legal load limit for this airplane.

The Court: How long do you estimate this case is going to take to try?

Mr. Talbot: Two days.

The Court: Mr. Nesbett?

Mr. Nesbett: Well, I don't know what he has in the way of proof, your Honor. With the jury, I'd say probably three days.

The Court: Well, this matter all came up this morning because you were in court upon a notice. Now, before we go to the Motion for Production, I think we ought to dispose of first, the Motion to Amend.

Mr. Talbot: If the Court please, there are two other important regulations.

The Court: Are there—what are they?

Mr. Talbot: I'd like to call the Court's attention—the first one is called CAB Regulation S-712 which became effective December 2, 1955, sixteen days before this crash, and that was a special regulation granting the Air Base permission to transport certain explosives by civil aircraft. We think it's clear from a reading of that regulation that it has nothing whatever to do with our case. Nevertheless, Mr. Nesbett is going to rely on it and the Court should consider it. The second regulation is Regulation SR-417 which was [33] adopted on May 28, 1956, about five months after this crash, and it's that regulation that I'd like to dwell on just a

little bit. Because what happened, your Honor, was that after this crash, Morrison-Knudsen Company went to CAB and requested a special regulation exempting Morrison-Knudsen and aircraft chartered by them, and specifically designating Cordova Airlines among others, and went to CAB and asked for permission to carry Class A explosives. And we say we think it's clear from this regulation that what happened in May of '56, was that CAB granted blanket permission to M-K, Cordova and others to carry this self-same dynamite for these self-same projects.

Now, this regulation is important because it, as I believe, is an authoritative interpretation of Part 49 of the CAB regulations with which we are concerned and it shows clearly the intent of the CAB with regard to this particular question.

I have certified copies of those two regulations and they are not printed in full in the Code of Federal Regulations. These were, incidentally, furnished to me by Mr. Nesbett who was kind enough to get two copies. I'd be pleased to furnish this to the Court at this time.

The Court: Well, I wish you would.

Mr. Talbot: I have underlined in red, I regret to say, the parts that I think are important, but I underlined a couple of things that would help Mr. Nesbett, too.

The Court: They may be received and I think they [34] ought to be introduced as exhibits in this case if they are going to be used.

Mr. Nesbett: Your Honor, could I ask then that your Honor accept two copies that are not underlined?

The Court: Oh, all right.

Mr. Talbot: That is quite agreeable with me.

The Court: Have you got some that is not underlined?

Mr. Nesbett: Yes, sir, and then in exchange for the two copies that are underlined, so that I will have a copy.

The Court: It may be received as Defendants' Exhibit A.

Deputy Clerk: Defendants' Exhibit A.

DEFENDANT'S EXHIBIT A

PLAINTIFF'S EXHIBIT 1

Farwest GENERAL AGENCY

EXCHANGE BUILDING • SEATTLE 4, WASHINGTON

Purchased Through

Renews No. Cert. No.

Assured

Effective Coverage Expires

PREMIUM $

Federal Tax $

Policy Fee $

State Tax $

Surplus Fee $

$ $

AIRCRAFT CERTIFICATE

NOTICE

NO FLAT CANCELLATIONS ALLOWED

This is to Certify That

Farwest GENERAL AGENCY

in accordance with authorization granted by certain **UNDERWRITERS AT LLOYD'S, LONDON, AND/OR COMPANIES** whose names and the proportions underwritten by them are or will be on file in the office of said Farwest General Agency and also on file in the office of Messrs. C. E. Heath & Co., Ltd., London, England, (such Underwriters and/or Companies being hereinafter called Insurers), has procured insurance as hereinafter specified for the persons named herein in respect of the coverage specified and on the terms set forth in and/or attached to this certificate. Pursuant to such authorization the Insurers do hereby bind themselves, each for his own part and not one for another, as follows:

Certificate No.

Renews No.

Agent

SCHEDULE

1. Name of Assured

2. Address of Assured

3. Certificate Term: From To
   12:01 A. M., standard time at the address of the named assured as stated herein.

4. Assured's Business or Profession is

5. Assured's interest in the Aircraft is that of

6. Description of Aircraft; Value(s); Limit(s) of Liability; Premium(s):

Aircraft Identification Mark and Number	AIRCRAFT MAKE AND MODEL	YR. OF MFG.	TYPE	PASS. CAP. (Excl. Crew)	ENGINE(S) MAKE AND H.P.	AGREED VALUE
Column 1	Column 2	Col. 3	Column 4	Col. 5	Column 6	Column 7

AIRCRAFT IDENTIFICATION MARK AND NUMBER	SECTION 1 LOSS OR DAMAGE TO AIRCRAFT — Flight risks not insured unless amount of deductible entered in column 9 hereunder		SECTION 2—THIRD PARTY LIABILITY — LIMITS OF LIABILITY					PREMIUM CHARGE
			COVERAGE A PUBLIC LIABILITY (Excluding Passengers)		COVERAGE B PROPERTY DAMAGE	COVERAGE C PASSENGER LIABILITY		
	Deductible Flight Risks*	Premium Charge	One Person	One Accident	One Accident	One Person	One Accident	
Column 8	Column 9	Column 10	Column 11	Column 12	Column 13	Column 14	Column 15	Column 16
	$						$	

7. Pilot(s):

8. Purposes for which Aircraft will be used:

9. Geographical Limits:

United States Internal Revenue Documentary Stamps in the amount required and applicable to this insurance have been affixed to the office records of this Certificate retained by Farwest General Agency.

The law provides for no federal tax refund once the insurance attaches.

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction **and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.**

It is further agreed that service of process in such suit may be made upon

and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

DATED

Farwest GENERAL AGENCY

By

This document is intended for use as evidence that FARWEST GENERAL AGENCY has at the request of the assured secured commitments that the insurance hereinafter specified has been effected with subscribing Underwriters at Lloyd's, London, and/or Companies against which Underwriters' and/or Companies' certificate or policy may be duly issued and conditions of such insurance as are contained in this certificate. Immediate advice must be given of any discrepancies, inaccuracies or necessary changes, as FARWEST GENERAL AGENCY shall not be responsible for errors in cable advice or mistakes or omissions of London brokers. This certificate constitutes the entire agreement between the parties and there are no oral understandings or agreements.

SECTION 1—LOSS OR DAMAGE TO AIRCRAFT

A. The Insurers will pay for or make good accidental loss of or damage to the Aircraft whilst in flight or on the ground or on the water, including any equipment or accessories while attached to and forming a part of the Aircraft, from whatever cause arising except frost; wear and tear; corrosion; gradual deterioration; mechanical breakage or breakdown, but including accidental damage caused thereby. This Section shall include loss or damage by burglary, theft or malicious means unless it be proved by the Insurers that such loss or damage was caused by a servant or agents or person under the control of the Assured.

B. It is understood and agreed that Insurers' liability under this Section in respect of any Aircraft shall not exceed the Agreed Value, including all equipment and accessories, as set forth in Column 7 of the Schedule, subject each and every claim in respect of Flight Risks to the deductible applicable to each such Aircraft as set forth in Column 9 of the Schedule.

C. Insurance as provided under this Section shall apply only to Aircraft for which a premium charge is set forth in Column 10 of the Schedule, and **Flight Risks are insured only in respect of such Aircraft for which a specific amount of deductible is set forth in Column 9 of the Schedule.**

D. Upon the occurrence of any accidental damage hereunder the amount of insurance on the Aircraft the subject of the loss shall be reduced by the amount of such loss until the date of completion of repairs, at which date the amount of insurance shall again attach as originally written unless written request to the contrary be given to Farwest General Agency for Insurers, and reinstatement premium computed on a pro rata basis shall be immediately due and payable.

SECTION 2—THIRD PARTY LIABILITY

1. The Insurers will pay on behalf of the Assured, within the limits specified in the Schedule, all the sums which the Assured shall become legally liable to pay as compensation, including costs awarded to any claimant, caused by or through or in connection with the Aircraft described in the Schedule, or articles dropped therefrom, under that Coverage or those Coverages set forth herein for which specific limits of liability corresponding both to Aircraft and Coverage are set forth in the Schedule for each such Aircraft.

   Coverage A—Public Liability: Loss from liability imposed by law upon the Assured for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons other than Passengers, caused by accident.

   Coverage B—Property Damage: Loss from liability imposed by law upon the Assured for damage to or destruction of property (excluding property owned, rented, leased, in charge of or transported by the Assured), including the loss of use thereof, caused by accident.

   Coverage C—Passenger Liability: Loss from liability imposed by law upon the Assured for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any Passenger or Passengers, caused by accident.

2. The Insurers will, in addition, defend, until they elect to pay their limit of liability, in the name of and on behalf of the Assured any claim or suit, whether groundless or not, brought against the Assured and in respect of which the Assured is entitled to indemnity under this Certificate and/or Policy, provided that the Insurers shall have the right to make such investigation, prosecution, negotiation, and settlement of any claim or suit as they may deem expedient; the Insurers will pay all costs taxed against the Assured and expenses incurred by or with the consent of the Insurers in defending such claims or suits, including interest accruing after entry of judgment on that part of the judgment not in excess of the limit of liability of the Insurers. This clause does not require the Underwriters to defend any claim or suit arising in connection with a violation of this Certificate and/or Policy.
3. The Insurers will pay expenses incurred by the Assured for such immediate medical and surgical aid as is imperative at the time any such bodily injury is sustained.
4. The insurance hereby of more than one Assured (whether named or not) shall not operate to increase the limits of the Insurers' liability.
5. The Insurers shall not be liable for claims:
   (a) in respect of death of or bodily injury to any person or persons where such death or injury arises out of and in the course of the employment of such person or persons by the Assured;
   (b) in respect of death or bodily injury to any member of the Assured's household or family or imposed upon or assumed by the Assured under any Workmen's Compensation Act, Plan or Law.

DEFINITIONS

"Civil Aeronautics Authority" as used herein shall mean the duly constituted authority of the United States of America having jurisdiction over civil aviation, or, if the risk is insured in Canada, the corresponding authority of the Dominion of Canada.

"Flight Risk" shall mean risks covered by this Certificate and/or Policy and shall be deemed to commence from the time the Aircraft moves forward in taking off, or attempting to take off, for the actual air transit and shall end when the Aircraft comes to rest or commences to taxi under its own power after making contact with the ground and/or water at the conclusion of a flight.

"Ground Risk" shall mean risks covered by this Certificate and/or Policy which are not either as to nature or to time included under the definition of Flight Risks.

"Passenger" as used herein shall mean any person in, on or boarding the Aircraft for the purpose of riding therein or alighting from the Aircraft following a flight or attempted flight therein, excluding, however, any Aircraft crew member(s) while in the course of employment by the Assured.

GENERAL EXCLUSIONS

This Certificate and/or Policy does not cover:

1. Any loss, damage or liability arising from:
   (a) War, riots, strikes, civil commotions, or military or usurped power or confiscation or requisition by any Government or Public Authority;
   (b) The use of the Aircraft for any purpose, or piloting by any person, other than for the purposes and by the pilot or pilots described in the Schedule, or outside the geographical limits named therein unless due to force majeure;
   (c) The use of the Aircraft for crop dusting, seeding, spraying, hunting from aircraft, closed course racing, or student instruction unless such use is specifically approved in the Schedule, or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers.
2. Any loss, damage or liability which at the time of the happening of such loss or damage or liability is insured by or would, but for the existence of this Certificate and/or Policy, be insured by any other Policy or Policies except in respect of any excess beyond the amount which would have been payable under such other Policy or Policies had this insurance not been effected;
3. (a) Loss of use of the Aircraft; (b) Personal effects; (c) Extra equipment valued in excess of $25.00 added to the Aircraft after the inception date of cover unless endorsed hereon and any additional premium required paid thereon;
4. Loss or damage due to wrongful conversion, embezzlement or secretion by any person in lawful possession of the Aircraft under a lease, conditional sale, mortgage or other contract or agreement whether written or verbal; the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured;
5. Loss or damage to any Aircraft described in the Schedule as a landplane which has been converted to any other type of Aircraft unless such conversion is authorized by endorsement hereto signed by Farwest General Agency for Insurers and any additional premium required paid thereon;
6. Liability assumed by the Assured by agreement under any contract unless such liability would have attached to the Assured in the absence of such agreement.

GENERAL CONDITIONS

1. At the commencement of each flight the Aircraft shall have a valid and current airworthiness certificate issued by the Civil Aeronautics Authority, and all inspections and/or maintenance prescribed by Civil Air Regulations shall have been accomplished. All requisite log books shall be kept fully completed and up to date and such documents shall be produced to Farwest General Agency for Insurers at any reasonable time should they so require in support of all or any claims hereon.
2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. Approved Operations Manual, and in accordance with operations authorized as set forth therein.
3. The Assured shall use due diligence and do and concur in doing all things reasonably practicable to avoid any loss or damage under both Sections 1 and 2 of this Certificate and/or Policy. In the event of the aircraft sustaining damage covered by Section 1 of this Certificate and/or Policy, the Assured or his/their accredited agents shall forthwith take such steps as may be necessary to ensure the safety of the damaged Aircraft and its equipment and accessories; and no flights other than those properly authorized under Civil Air Regulations and which are solely necessary for the safekeeping of the Aircraft shall be made prior to submission of written notice of loss to Farwest General Agency, and receipt of specific authorization from Farwest General Agency on behalf of Underwriters for such flight(s).
4. **Immediate Notice** of any event likely to give rise to a claim under this Certificate and/or Policy shall be given by or on behalf of the Assured to Farwest General Agency, Exchange Building, Seattle 4, Washington, U. S. A., to whom the Assured shall furnish full particulars in writing of such event and shall forward immediately notice of any claim by a third party and any letters or documents relating thereto and shall give notice of any impending prosecution. The Assured shall render such further information and assistance as the Insurers may reasonably require and shall not act in any way to the detriment or prejudice of the interests of the Insurers.
5. The Assured shall not make any admission of liability or payment or offer or promise of payment without the written consent of Farwest General Agency for Insurers. The rights of the Assured against other parties as respects any payment under this Certificate and/or Policy shall, to the extent of such payment, be subrogated to the Insurers, and the Assured shall execute all papers required to secure to the Insurers such rights.
6. Bankruptcy or insolvency of the Assured shall not relieve the Underwriters of any of their obligations hereunder.
7. The Insurers shall not be liable for any reward offered without the written consent of Farwest General Agency for Insurers, and in the event of loss hereunder there shall not be any abandonment of Aircraft to Insurers without their consent.
8. This Certificate and/or Policy may be cancelled at any time at the request of the Assured, in which case the Insurers, upon demand and surrender of this Certificate and/or Policy, shall refund the excess of paid premium above the customary short rate premium for the expired term. This Certificate and/or Policy may be cancelled at any time by the Insurers by giving to the Assured a ten days' notice of cancellation, said notice stating when cancellation shall be effective and shall be deemed to have been properly given if notice is addressed to the Assured at the last address stated in the Certificate and/or Policy and deposited in the United States mail, postage prepaid. Such cancellation notice is to be given with or without tender of the excess of premium above the pro rata premium for the expired term, which excess, if not tendered, shall be refunded on demand. Such cancellation shall be without prejudice of any claim originating prior thereto.
9. If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Certificate and/or Policy shall become void and all claims thereunder shall be forfeited.
10. No assignment of this Certificate and/or Policy, and no waiver or change in any part of its terms, or conditions, shall be valid unless by endorsement issued to form a part hereof, signed by Farwest General Agency for Insurers.

CURRENCY CLAUSE. It is understood and agreed that all amounts used herein are in UNITED STATES CURRENCY, and that premium shall be paid and all losses shall be paid and adjusted in UNITED STATES CURRENCY.

"EXHIBIT A"

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35-E

Mr. Talbot: On this point, your Honor, of whether or not Cordova Airlines knew about this movement of explosives, the Bruce case which I cited to your Honor in the beginning holds——

The Court: Well, now, I will read those cases; I will read every one of those cases.

Mr. Talbot: In order then to help the Court on this one point of whether or not the dynamite was lawfully carried, we took the deposition of Cordova Airlines last Saturday by its president, Mr. Smith, and there are some questions and answers in that deposition that are material to the point which, your Honor, which we have been discussing today.

The Court: Well, now, the problem in this case is [35] that somebody has demanded a jury trial and I am going to have to present all these facts to the jury. I am going to have to rule upon the admissibility of whether they should go to the jury, but these facts are going to have to be presented to the jury.

Mr. Talbot: The carriage of dynamite, though, is admitted and Mr. Smith—Cordova Airlines has made certain admissions in this deposition——

Mr. Nesbett: Your Honor——

Mr. Talbot (Continuing): ——which is undisputed, and there is no need to send the question to the jury on the dynamite business, and no interpretation of the policy; that is for the Court. The overloading question, that is for the jury, but if your Honor were to decide this point in our favor we wouldn't have to have a jury trial.

Mr. Nesbett: We are not in here to argue a mo-

tion for summary judgment or any such thing; as I recall, I am in extremely short notice to determine whether two additional defenses are to be allowed to Lloyd's.

The Court: That is right and if we have a jury for the case, I think I will give it all to the jury.

Mr. Talbot: Very well.

The Court: You are presenting a pretty difficult case to the jury, but if you want to present it to the jury it's all right. All I want to do is see that they get all the [36] facts. Now, let's consider the Motion, for a moment, this Motion To Amend the Answer. Now, Mr. Nesbett, are you penalized in any way if I grant that motion?

Mr. Nesbett: I can't anticipate at all what they suddenly discovered that would cause them to bring these two defenses in at this late date, your Honor, after the case has been on file so long and I object to the—to allowing an answer of those two defenses and I will submit it to your Honor. One of them, at least, has been discussed here in some detail.

The Court: Well, I will tell you as I tell our attorneys down my way that we don't try lawsuits upon the pleadings. We try them upon the evidence and so I believe that the party should have the right to present all their case to the court or to the jury; so, I will grant your Motion To Amend.

Mr. Talbot: Thank you, your Honor.

The Court: Now, we come to the question of production of documents. Do you oppose the production of all these documents, or just certain ones that you oppose?

Mr. Nesbett: We met in my office yesterday about 4:00 o'clock and I think Mr. Talbot has been completely satisfied as to all those demands and many of them I had, and he has now at his disposal in my office to photograph and inspect and as far as I know, we have no bone of contention to [37] take your Honor's time——

Mr. Talbot: Mr. Nesbett was extremely courteous and helpful to me, your Honor, and he is going to allow me to have copies of things I need, but there is one—well, I might point out that our demand for records of the National Bank of Alaska is withdrawn because the National Bank of Alaska is withdrawing from this case. There are certain other certificates and waivers which we have—which we demanded production. Mr. Nesbett advises me that as far as he knows there are no such documents. I am pleased to think that there are no such documents, but I was wondering if—what your Honor would wish in that case. I thought maybe an affidavit from Mr. Smith that there are no such documents or some way to protect the record and protect my clients other than Mr. Nesbett's word, although I believe him implicitly.

The Court: Well, I rely upon counsel's word until I have been convinced to the contrary and I think counsel never—most counsel don't misrepresent——

Mr. Talbot: I predict you never will be disappointed with Mr. Nesbett's word, your Honor, but suppose they had these documents in the Cordova,

Alaska office and they hadn't been disclosed to Mr. Nesbett; then, where would I be?

Mr. Nesbett: That could happen alright. It makes a dangerous situation.

The Court: Well, may I do this: may I make an [38] order that Monday morning you produce and present to the Clerk for marking all documents you expect to use in this case and have them marked for identification. I'd like to have those presented before Monday if I could get them presented, but this is Friday and ordinarily in a case in which there is any documents I'd like to have all the documents in and marked and identified so we don't have to waste the time of the jury with the introduction and marking of the documents. Why can't you come in at 9:30 Monday with your documents?

Mr. Nesbett: Your Honor, I was appointed in a criminal case and I have to go in at 9:30—let's see, that is June 2nd, Monday?

Mr. Talbot: Yes.

The Court: Are you going to try a criminal case?

Mr. Nesbett: No, sir, to appear briefly for some reason or other in connection with contempt of court that grew out of some other criminal trial.

The Court: Yes, I think I read something about that. Could you come in this afternoon with your documents?

Mr. Nesbett: We have an argument this afternoon. I just finished a brief.

The Court: Well, that argument is not going to take very long, is it?

Mr. Nesbett: Well, I don't think so.

The Court: I don't know what—I am not interested [39] in authorities——

Mr. Nesbett: I don't see how he can photograph the documents that he wants in my office by this afternoon unless he'd work pretty fast.

Mr. Talbot: There is one other thing, your Honor. I sent a telegram on Tuesday to a lawyer in Washington, D. C. to get certain documents from the Civil Aeronautics Board. He wired back that he mailed them yesterday. I have never seen these documents; I don't know what they are, but they may constitute evidence——

The Court: All right, may I suggest this: on Monday——

Deputy Clerk: Eight o'clock, Judge, you have the case of Kessler -vs.- Kastner.

The Court: I am going to give sometime to that case before I take up your case and it may not take——

Mr. Nesbett: That does bring up a point on that. Counsel stipulated that the Kastner case can be handled after this one because I noticed your Honor called the jury back for Monday.

The Court: Well, I don't know why the Kastner case has to be handled after this one.

Mr. Nesbett: It doesn't have to be as far as I am concerned.

The Court: Well, I don't know, but there is some [40] problems in the Kastner case that I want to get out of the way before we ever go to trial so——

Mr. Nesbett: I think your Honor does——

The Court: So, I expect to give sometime to the

Kastner case. The trouble is, Mr. Nesbett is in both of these cases. If Mr. Nesbett wasn't in both of these cases I'd get another clerk and put you in another room and make you mark your documents while I am handling the Kastner case, but I guess I can't do that with Mr. Nesbett here.

How many documents are you going to have?

Mr. Nesbett: Well, I won't have many at all; hardly any. He's taking all that he wants out of my files and I can't anticipate any. I hope I am not bound after the evidence is in on these affirmative defenses by any rule that prevents me from submitting anything as a defense. I haven't, of course, pleaded in response to those affirmative defenses.

The Court: Well, I don't suppose we can get the documents marked before they commence trial.

Deputy Clerk: If counsel would like to meet with me tomorrow, or Saturday, we could get them marked because this case is going to take time.

The Court: Well, that would mean you'd have to open up the court and it's—we will probably wait until Monday. We will wait until Monday.

Deputy Clerk: Would you like to come in at 8:00 on [41] Monday?

Mr. Talbot: No.

The Court: Well, I think I have a pretty good understanding of the issues involved in this case——

Mr. Nesbett: There's still something——

The Court (Continuing): ——at least, enough to try to explain them to the jury.

Mr. Nesbett: Your Honor, there are still very important matters in that as far as your Honor's

study of the pleadings are concerned that will simplify this case to no end and that is the stipulations we have just entered into this morning and signed and——

The Court: Well, I understood you were going to file them but I didn't know they were ready to be filed.

Mr. Nesbett: Well, they're handwritten but we thought we'd give you a copy now.

The Court: I'd like to have them.

(Thereupon, the Court was handed a copy of the above-mentioned stipulations.)

The Court: Well, you be back here on Monday morning and sometime Monday morning we will probably be able to start this trial. I hope we get a jury before noon on Monday. Judge McCarrey is having a jury trial, I believe, on Monday and so I probably will wait until after he gets his jury before I can do anything, but in the meantime I will discuss this [42] other case.

Mr. Nesbett: Could I give your Honor two citations that occurred to me?

The Court: I'd be very happy to have your citation.

Mr. Nesbett: 163 Atlantic, 713. Does your Honor care for titles?

The Court: 163 Atlantic, 713?

Mr. Nesbett: Yes.

The Court: No, I don't care about the titles.

Mr. Nesbett: Concerning the difference between "exclusions" and "exceptions" in the policy, and

your Honor, 151 Southwestern at 91, the definition of the phrase "reasonably practicable"; likewise a California case, 55 Pacific Sec. 1195.

The Court: What was the volume?

Mr. Nesbett: 55.

The Court: 55?

Mr. Nesbett: Yes, sir.

The Court: 1195?

Mr. Nesbett: Yes, sir, "reasonably practicable" again. That's all then.

Mr. Talbot: Your Honor, these two books of regulations that I am quoting from belong to the Court. I can return them.

The Court: Are they in the library?

Mr. Talbot: I will return them to the library immediately. [43]

The Court: All right. I wish you would, because I may have a chance to look at them this afternoon.

Mr. Talbot: I was wondering what your Honor's practice is with regard to special interrogatories to a jury?

The Court: I never give them.

Mr. Talbot: Thank you.

The Court: And, also, I might say to counsel that if you have any questions you want put to the jury, please present them in writing and I will be glad to put them to the jury and I would like to have your jury instructions at the beginning of the trial.

Mr. Nesbett: Before you adjourn, your Honor, may I file that (indicating)? It's in connection with the case we are having at two o'clock.

The Court: Yes, it may be filed.

Mr. Talbot: I'd also like to file our trial memorandum in the Cordova case.

The Court: Let me have both of them.

(Thereupon, the Court was handed both of the above-mentioned documents.)

The Court: Court will now stand in recess until two o'clock this afternoon. [44]

(Thereupon, at 12:00 o'clock a.m., Court was recessed, this case to be resumed at 10:00 o'clock a.m., Monday, June 2, 1958.) [45]

The Court: 12,349, Cordova Airlines versus Underwriters at Lloyd's.

Mr. Nesbett: Plaintiffs are ready, your Honor.

Mr. Talbot: The Defendants are ready, your Honor.

The Court: You may call the jury.

(Whereupon, the Deputy Clerk proceeded to draw from the trial jury box, one at a time, the names of the members of the regular jury panel of petit jurors and counsel for both plaintiff and defendant examined and exercised their challenges against said jurors, until the jury of twelve was completed and counsel for plaintiff and counsel for defendant stipulated that a verdict of less than twelve jurors may be received in case of illness, disability, or other good cause for excusing one of the jurors and that it is therefor unnecessary to draw the names of alternate jurors in the cause. Where-

upon, said jury was duly sworn to well and truly try the cause and a true verdict render in accordance with the evidence and the instructions of the court, after which the following proceedings were had:)

The Court: May I inquire of counsel, have you instructions? Have you written instructions?

Mr. Talbot: Yes.

Mr. Nesbett: Yes.

The Court: I'd like to have your instructions because I start working on your instructions the minute we start the case and my rulings on objections depends a great deal upon the issues raised in your instructions.

Mr. Nesbett: Your Honor, I just have—my [47] secretary just brought some in. I wonder if we could have a 5-minute recess?

The Court: Ladies and gentlemen of the jury, we are about to take a recess. It is my duty to admonish you that you are not to discuss this case with anyone and you are not allowed to have anyone discuss it with you until the rights of the parties have been finally submitted to you. With that admonition we will now recess until 10 minutes after 11 o'clock.

(Whereupon, at 11:10 o'clock a.m., June 2, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had):

The Court: Is it stipulated the jury is present in the box?

Mr. Talbot: Yes, your Honor.

The Court: Do you want to make an opening statement?

Mr. Nesbett: Your Honor, Mr. Talbot and I have agreed that probably at this time it might be wise to read into the record certain stipulations that we have entered into.

The Court: You can. Before you make the opening statement?

Mr. Nesbett: Yes, your Honor.

The Court: All right. I might say to the [48] jury that when counsel agrees to the facts and stipulate to it that you are to take those stipulations as facts conclusively proved, no doubt in your mind, that when the stipulation is made that you don't have to worry any more about the proof of the facts as to those particular stipulations.

Mr. Nesbett: Your Honor, counsel for the parties have agreed to stipulate that Cordova Airlines has complied with all conditions precedent to the commencement of this suit; they have agreed that the airplane, the subject of this suit, was almost totally destroyed on December 18, 1955.

They have agreed to the dismissal of the action against Farwest General Agency, Inc., as to the second and third cause of action but agree also that Farwest shall be retained as a party defendant as a possible insurer as to the first cause of action. The parties expect a telegram from Farwest during the

course of this trial that will reflect further on the advisability of their remaining a party.

The parties have agreed through counsel that Cordova Airlines is duly qualified or is a duly qualified corporation.

Counsel for the parties have agreed that D. K. McDonald, Inc., is properly licensed as a broker in Alaska.

Counsel for the parties have agreed that any gasoline found by the jury to have been in the tanks on board aircraft N1569 "Charley" at the time of its crash weighed 6 pounds per gallon. [49]

The parties through counsel have agreed that the second and third cause of action set out in the Complaint be dismissed.

The parties through counsel have agreed that the following additional underwriters be joined as defendants in the suit and the Complaint be deemed amended accordingly: Victoria Insurance Company, Ltd., Orion General Insurance Company, Ltd., and Eagle Star Insurance Company, Ltd., in proportion to their burden of any loss that might be found, they might be found liable for according to an agreement between them.

The parties through counsel have agreed that the certificate of insurance provided $16,000.00 in coverage, less $800.00 as a deductible clause or a net coverage of $15,200.00, to which Cordova Airlines is entitled if the underwriters are ultimately found liable.

The parties through counsel have agreed that the

dynamite on board the aircraft N1569 "Charley" at the time of the crash did not explode.

The parties through counsel have agreed that a certain face sheet of the certificate of insurance as pleaded in the Answer contained a portion of the terms of the certificate issued for the period in question. A copy of that face sheet has been given to your Honor.

The parties through counsel have [50] additionally stipulated that the dynamite carried on the flight in question weighed 50 pounds net per carton and that a carton to be produced at the trial by counsel for the underwriters is typical of those cartons carried on the flight in question.

The parties through counsel have stipulated that by the terms of an applicable contract with the United States Air Force, all supplies and materials purchased by Morrison-Knudsen Company for the Big Mountain site were to become the property of the United States Government immediately upon purchase.

Parties through counsel have stipulated that the defense of the underwriters alleging a violation of the terms of the policy because a certain wheel-ski arrangement had been installed on the plane without being approved by the proper CAA designee be withdrawn as a defense.

And lastly, the parties have stipulated through counsel that your Honor, Judge Westover, has the consent of both sides to try this case and both sides waive any matter or question of jurisdiction or the power of the Court to try the case.

I believe that is all, unless I overlooked one.

Mr. Talbot: Yes——

The Court: Well, I understand from the—did you want to say anything?

Mr. Talbot: I just wanted to add for the record that Mr. Nesbett has stated exactly and precisely the stipulations [51] between counsel.

The Court: Well now, I understand then from the statements of counsels' stipulations, the stipulation that there are only two defenses here and that is overloading and the carrying of dynamite?

Mr. Talbot: No, your Honor. There are three defenses. The third defense—should I state it?

The Court: Yes.

Mr. Talbot: The third defense is that on the flight in question, in order for the flight to have been lawfully made the airlines should have secured a waiver from the Civil Aeronautics Authority, and the policy provides that in order for coverage to be afforded on a flight for which a CAA waiver is required, that the airlines must in addition secure the express written consent of Farwest General Agency of Seattle as agent for the defendant underwriters. That is the third defense.

The Court: Well then, I understand now that there is coverage except for these defenses?

Mr. Talbot: That is correct, your Honor.

The Court: You admit that if these defenses are not good then there is coverage, the insurance companies would be liable?

Mr. Talbot: If none of the three defenses were good, that is right, your Honor.

The Court: Mr. Nesbett, do you want to make an [52] opening statement?

Mr. Nesbett: Yes, your Honor.

(Thereupon, opening statements were made by counsel for plaintiff and counsel for defendant, after which the following proceedings were had):

The Court: I might say to the jury that statements of counsel are not evidence in this case, that at the beginning of the case counsel has the right to make an opening statement. An opening statement is nothing less than a statement of the lawyers as to the facts they expect to prove. It's been my experience that sometimes lawyers get over enthusiastic and say they are going to prove more than they actually prove, which you remember. You are to judge this case from the testimony of the witnesses, not from the statements of counsel.

At the end of the case counsel has the right to argue the case to the jury. Again, the argument of counsel is not evidence. It is only their opinion as to what the evidence proves. You are the sole judges of the evidence in this case. I can't judge the evidence. The attorneys can't judge the evidence. This is your duty, and the evidence must be judged from the testimony that is produced before you—the testimony of the witnesses, stipulations of counsel, documents that are introduced. I think we ought to have introduced in this case the policy, don't you think, the policy and the exceptions? [53]

Mr. Nesbett: I think it was introduced, your Honor, as Plaintiffs Exhibit A.

The Court: It's already been introduced? All right.

Mr. Nesbett: Plus the face sheet we have mentioned.

The Court: All right. You may proceed, Mr. Nesbett.

Mr. Nesbett: I will call Mr. Merle Smith.

MERLE K. SMITH

called as a witness for and on behalf of the Plaintiffs, and being the plaintiff, testifies as follows on

Direct Examination

By Mr. Nesbett:

Q. State your full name, please, Mr. Smith?

A. Merle K. Smith.

Q. What is your business?

A. President of Cordova Airlines.

Q. Mr. Smith, how long have you lived in Alaska? A. 21 years.

Q. And how long have you been associated with Cordova Airlines? A. Since 1937.

Q. And in what capacity did you associate yourself with Cordova Airlines in 1937?

A. As a pilot.

Q. And how long had you been a pilot at that time, that is, as of 1937? [54] A. Since 1928.

Q. And when did you become president of Cordova Airlines? A. In 1939.

(Testimony of Merle K. Smith.)

Q. As president of Cordova Airlines were you at all engaged in flying as a part of your activities?

A. Yes, I continued on as a pilot from '37 up until about 6 years ago.

Q. Now Mr. Smith, when did you—or rather I will ask you how many airplanes did Cordova Airlines own when you became president?

A. Two.

Q. How many airplanes does Cordova Airlines own at the present time? A. Ten.

Q. And does Cordova Airlines have any certificates issued by the Civil Aeronautics Board?

A. Yes.

Q. And will you state what certificates have been issued to Cordova?

A. We have certificates, Valdez—Anchorage, Valdez—Cordova, and a route up through the Copper River Valley into Chisana, taking in about 8 points, and we have a route now to Seward and also a route, 14 stops, in Prince William Sound. And we also have Gulkana, now.

Q. Now calling your attention to the month of December, 1955, [55] did Cordova Airlines own any Cessna 180 airplanes? A. Yes.

Q. How many? A. Three.

Q. Did Cordova own an airplane registered as N1569 "Charley"? A. Yes.

Q. And did you have occasion during the month of November of 1955, to charter that airplane in any fashion?

(Testimony of Merle K. Smith.)

A. Yes, we entered into a contract with Morrison-Knudsen Company.

Q. Would you state briefly the parties to that contract and the duties that Cordova Airlines was to perform?

A. The parties to the contract was—we had a contract with Morrison-Knudsen, who were subcontractors for Western Electric and the Air Force. And the duties—our duties—were to place the airplane at the disposal of Morrison-Knudsen personnel at—in the vicinity of Iliamna Lake.

Q. Was the purpose that the airplane was to be used for indicated or stated in the contract or the arrangement you entered into?

A. No. We were just to fly it as they instructed us to and that was our instruction to the pilot.

Q. As who instructed you to?

A. As the bosses, the superintendents of MK in Iliamna, that region. [56]

Q. MK is Morrison-Knudsen Company, is it?

A. Yes.

Q. Was Cordova Airlines obligated to furnish the pilot of the airplane in connection with that contract?

A. We were to furnish a pilot, do the maintenance, and the gasoline and oil.

Q. And what was the compensation arrangement between Morrison-Knudsen Company and Cordova?

A. We were to be paid on an hourly basis with the guarantee of 3 hours a day whether we could fly or not.

(Testimony of Merle K. Smith.)

Q. Mr. Smith, what pilot did you assign to that airplane to carry out your obligation under the contract? A. Herbert Haley.

Q. And will you state how long Herbert Haley had been a pilot with that airlines, that is Cordova Airlines, since December, 1955?

A. I hired him first in 1942 and he was practically a continuous employee of the company from that time on. I think he left during the war for 18 months or 2 years and then he come back and outside of furloughs and so on, why he was pretty much with us all the time.

Q. How long had you known Mr. Haley?

A. Since 1924.

Q. Do you know how long he'd been a flyer?

A. I beg your pardon. I met him in 1924 and he —I don't [57] exactly know, but he'd been flying several years then. He was considered an experienced pilot.

Q. Were you a pilot in 1924 at the time you met Mr. Haley? A. No.

Q. Now, do you know how many hours of flying time or experience Mr. Haley had until the time he was assigned to this contract in Iliamna with the 180?

A. He had in excess, I believe, of 12,000 hours.

Q. Now, you did and it has been agreed that you had insurance covering this airplane 1569 "Charley," is that not correct? A. Yes.

Q. And with whom did you deal in effecting that coverage?

(Testimony of Merle K. Smith.)

A. We dealt with our local broker, Coffey-Simpson Agency, now Insurance, Incorporated.

Q. And you know now, of course, that the Coffey-Simpson Agency arranged coverage through Farwest General Agency in Seattle who in turn arranged coverage with Lloyd's of London and Eagle Star Insurance Company, Ltd. and Orion Insurance Company, Ltd. and the one other insurance company, Victoria Insurance Company, Ltd., all to share in the loss if any occurred for which they were responsible on this airplane, don't you?

A. Yes.

Q. And it has been agreed that that airplane was totally destroyed? You know that as a fact, don't you? [58] A. Yes.

Q. The stipulation says "practically destroyed." Did Cordova Airlines—was Cordova Airlines able to salvage any of the parts from the wreckage of that airplane? A. No.

Q. Mr. Smith, as a result of the insurance coverage mentioned by the policy which is Exhibit A, and the loss of the airplane, did you make any demand for payment of the proceeds of the policy to you to cover the loss? A. Yes, we did.

Q. And did you receive any payment from the underwriters? A. No.

Q. Did the underwriters deny liability?

A. Yes.

Mr. Nesbett: I believe that is all, your Honor.

The Court: Cross-examine.

(Testimony of Merle K. Smith.)

Mr. Talbot: No questions, your Honor. We may want to call Mr. Smith later as an adverse witness.

The Court: All right. I wonder, Mr. Smith, if you will stay. I suppose you will stay in attendance of this trial until we finish up? A. Yes, sir.

The Court: I notice it's pretty near 12 o'clock and if you have a short witness we will proceed with that short witness, otherwise I think we will take a recess now until after [59] lunch.

Mr. Nesbett: I would prefer the recess, your Honor. I think I will rest my case.

The Court: All right. I might advise that the members of the jury who are not now in the box may be excused until next Monday morning at 10 o'clock. Will you return to this department next Monday morning without any further notice? The court will now stand in recess until 2 o'clock this afternoon.

(Whereupon, at 11:50 o'clock a.m., June 2, 1958, the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., counsel for the Plaintiff being present and counsel for the Defendant being present, the trial of said cause was resumed):

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: You may proceed. Mr. Nesbett, are you——

Mr. Nesbett: Your Honor, the Plaintiff rests.

Mr. Talbot: Your Honor, I would like to advise the court of two further stipulations which have been entered into by counsel.

The Court: All right. [60]

Mr. Talbot: The first is that the action may be dismissed with prejudice as to the Plaintiff National Bank of Alaska and without cost, and the second is that the action may similarly be dismissed as to the Defendant D. K. McDonald Company, d/b/a Farwest General Agency. And I can advise the court and wish to, that at 12 o'clock I received telegraphic authority from Seattle authorizing me to appear in defense for the three underwriters other than Lloyd's of London. And counsel have stipulated that the Answer may be deemed to be amended to include and assert the same defenses on behalf of those three underwriters.

The Court: Such may be the order.

Mr. Talbot: Your Honor, before proceeding with the first witness for the Defendants I wonder if we might approach the bench?

The Court: All right.

(Whereupon, counsel for the plaintiff and counsel for the defendant approached the bench and the following proceedings were out of the hearing of the jury):

Mr. Talbot: Your Honor, Mr. Nesbett and I have a serious disagreement as to the admissibility of certain documentary evidence which was furnished to the Defendants by the Civil Aeronautics Board

in Washington. I do not want to prejudice the jury against——

The Court: You don't want to what? [61]

Mr. Talbot: Want to run the risk of prejudicing the jury against the Plaintiff by going into the question of the Civil Aeronautics Board documents in the presence of the jury, but I do have several regulations, statutes and a couple of case decisions that I would like the Court to consider in connection with these documents and also perhaps refer to the report of the Civil Aeronautics Board which I don't think is proper to do before the jury.

The Court: Well, why don't you offer them and if there's any objection I'll rule upon the objection.

Mr. Talbot: Very well.

Mr. Nesbett: Your Honor, I appreciate his thought on it and I can see where there will be a number of documents that he would like to introduce. I intend to object. We have gone over it and he knows which ones I object to and I think that——

The Court: Would you rather have the objections outside of the presence of the jury.

Mr. Nesbett: I believe so, your Honor, and then we could go into the whole matter right there.

The Court: All right. I will excuse the jury and you can present your documents and I will rule upon them.

(Thereupon, when the discussion was completed counsel for the plaintiff and defendant resumed their seats and the following proceedings were had in the presence of the court and jury): [62]

The Court: Ladies and gentlemen of the jury, a question of law has arisen and as you are not concerned with the law in this case but only with the facts, I am going to ask that you retire to the jury room until we can dispose of the questions of law. As soon as we can dispose of those questions you will be called back into the jury box. I don't anticipate it will take very long, but you never can tell when attorneys start to argue. Will you retire from the jury box as quietly as possible?

(Whereupon, the jury left the jury box and retired to the jury room to await being called, and the following proceedings were then had in the absence of the jury):

The Court: Now, the documents you want to present—supposing you give them to the Clerk and have them marked for identification and then we can have them in the record.

Mr. Talbot: Your Honor, there are two particular documents which are in dispute. There are others of which I think we may have the original available in Mr. Nesbett's file. But these two—the first one is a letter addressed to the Civil Aeronautics Board.

The Court: Well now, let's have it marked for identification and then I'll look at it and you can——

Deputy Clerk: This is Defendants B for Identification, A being the face sheet. [63]

The Court: A is the policy?

Mr. Talbot: No, that would be Plaintiffs Exhibit 1 if it's anybody's.

Deputy Clerk: Pardon me—A being the Civil Aeronautics Board certified copy of the regulations.

Mr. Talbot: Very well. Yes.

Deputy Clerk: This will be Defendants B for Identification.

Mr. Talbot: Very well. Thank you.

Mr. Nesbett: Defendants A was the Civil Aeronautics Board——

Deputy Clerk: Right.

Mr. Nesbett: What was the policy? I thought that was Exhibit A?

Deputy Clerk: That was Plaintiffs 1, was Exhibit A of the Complaint and the face sheet of the policy, was it not?

The Court: Well, we ought to have the policy marked as Plaintiffs Exhibit 1.

Deputy Clerk: I have seen no policy except——

Mr. Talbot: We don't have the actual original policy.

The Court: Well, are we—we are just interested in the exceptions. Can the exceptions be—can the back of the policy be marked as Plaintiffs Exhibit 1?

Mr. Nesbett: Well, the photostat of the policy that is attached to the Complaint plus that face sheet is the policy. [64]

Deputy Clerk: And it's Plaintiffs 1.

The Court: All right.

Mr. Nesbett: And Defendants——

Mr. Talbot: And this will be Defendants C for Identification.

Mr. Nesbett: The CAB orders are what?

The Court: Exhibit A.

Deputy Clerk: Defendants A.

Mr. Talbot: I believe these photographs may be marked as one exhibit. They are numbered serially, themselves.

The Court: Just a minute. Have you got the B and C marked?

Deputy Clerk: I will have in just a moment.

The Court: Let her get it down. You can't go any faster than the Clerk can go.

Deputy Clerk: Now, D was in series, Mr. Talbot?

Mr. Talbot: Yes.

Deputy Clerk: D was one exhibit in series?

Mr. Talbot: Yes.

Deputy Clerk: Comprised of 9 photos?

Mr. Talbot: Correct. E is a map. There's one more which will be F.

The Court: Are these all the exhibits?

Mr. Talbot: Yes, your Honor, assuming that Mr. Nesbett is able to produce the originals of 3 more that I have, but I [65] think the original would be preferable evidence in that case if he has them.

The Court: Well, Mr. Nesbett, what is your objection to Exhibit B?

Mr. Nesbett: What is Exhibit B, your Honor?

The Court: Well, I'm sorry—don't you have copies?

Mr. Nesbett: No, sir, and I couldn't tell.

The Court: All right, look at it.

Mr. Nesbett: (Short pause). I have no objection. It's the first time I have seen it.

The Court: It may be received in evidence. Well now, how about Exhibit C?

Mr. Nesbett: What was that, your Honor? (The exhibit was handed to counsel). I object to it because it hasn't been identified. As far as I know—the signature of Poppas may be Poppas' signature. Whether he is a witness to identify the letter, I don't know, but I certainly object to agreeing that it go into evidence at this stage, your Honor. It purports——

The Court: May I have that a minute? (The exhibit was handed to the Court).

Mr. Nesbett (Continuing): ——purports to outline the loading of the aircraft.

The Court: Well, do you have any dispute that there was hauled on the date of the crash 16 boxes of dynamite?

Mr. Nesbett: Why, certainly, your Honor. [66]

The Court: Oh, there's——

Mr. Nesbett: Oh, my goodness, yes. And I expect of course, Lloyd's will attempt to prove that the plane was overloaded. Whether there were 16 boxes on board is a vital fact.

The Court: Well, counsel, I don't know whether you can have this admitted in evidence or not. Where is your authority?

Mr. Talbot: First authority I'd like the Court to consider is a Civil Aeronautics Board regulation.

The Court: Well, now, Civil Aeronautics Board is not running the court, and where is your authority for the introduction of this document?

Mr. Talbot: Very well, we will turn to an Act of Congress, then, your Honor. Title 28, United States Code Annotated, Section 1732(b).

The Court: All right. Well, that's perfectly all right, but to introduce any documents under 1732(b) you have got to lay a foundation.

Mr. Talbot: Yes, your Honor.

The Court: Have you got any witness here who can lay the foundation?

Mr. Talbot: I think perhaps I can lay a foundation sufficient to satisfy your Honor. I would be agreeable to being sworn, as far as that goes, or I can advise the Court how the document came into my possession. [67]

The Court: Well, that's not the problem here. This is related to the records kept in the regular course of business.

Mr. Talbot: Yes, your Honor.

The Court: Now, are you going to have to have someone testify that this was kept in the regular course of business and that it was customary to keep such records that come out of the files of the company.

Mr. Talbot: No, your Honor. This document was kept in the regular course of business of the United States Civil Aeronautics Board and it is to that point that I have these authorities to refer to, your Honor. And section 1732(b) specifically refers to a photostatic copy of any record kept in the usual course of business or activity by a Government agency.

The Court: It's not the question of a photostatic copy. You have no objection to that, do you, Mr. Nesbett, to the photostatic copy?

Mr. Nesbett: The letter itself, if the letter itself is admissible of course not, your Honor, but as near as I can see, if that is admitted there's John Poppas or whoever it is signing the letter stating a fact that actually is an issue before the Court. Not under oath, and not even in court.

The Court: Who is John Poppas?

Mr. Talbot: John Poppas is an official of, an employee of Morrison-Knudsen Company, not a party to the action.

The Court: Where is he? [68]

Mr. Talbot: I believe he's available in town, your Honor.

The Court: Well, you'd better have him here, then, rather than have this letter. I think the Plaintiff should have a right of cross-examination.

Mr. Talbot: I will assist Mr. Nesbett in getting Mr. Poppas, but your Honor, the statute provides that the knowledge——

The Court: Well, listen—it's not assisting Mr. Nesbett to get Mr. Poppas. This is an important witness. You'd better have him here. You don't want to assist him—it's your witness.

Mr. Talbot: Well, your Honor, we rely on the statute that says that the knowledge of the person making the report shall go to the weight, but not the admissibility of the document. And I have a case in point on CAB records just such as this one.

The Court: What's your case?

Mr. Talbot: 97 Federal Supplement 461. May I quote part of a paragraph?

The Court: 97 Federal Supplement 461?

Mr. Talbot: Yes, sir. It's a decision by Judge Laws, Chief Judge of the District Court for the District of Columbia. Page 461, Judge Laws says:

"The Civil Aeronautics Act, as amended, makes express provision for written reports to the Civil Aeronautics Board. If the facts contained in them were intended to be withheld from [69] the party injured in a crash or from the Court in a suit brought by such party, it would have been a simple matter to refer to them specifically. Yet the Act refers only to "reports of the former Air Safety Board or the Civil Aeronautics Board" as being exempt from use. It is true mention is made in the statute of investigations by the Board, but the language readily may be construed to make privileged only reports of the investigations, not information received in the course of the investigation."

The other authority I'd like to refer the Court to is 183 F. 2d, 467, in which the Court of Appeals for the Third Circuit in 1950 held that it was error for the District Judge not to allow in evidence a copy of the report of the Bureau of Mines of the Department of Interior, even though that report contained conclusions of the Board based admittedly on hearsay as well as personal observations.

The Court: Well, this is not a report of the Civil Aeronautics Board. This is a letter written by Morrison-Knudsen Company.

Mr. Talbot: That's true, your Honor.

The Court: This is not even written to the Board. This is written to the contracting and claims

section. Contracting claims section of what? It may be even written to the contracting claims section of Morrison-Knudsen Company.

Mr. Talbot: Your Honor, I can show that that document was furnished to us as part of the report of the Civil Aero—of [70] the file of the Civil Aeronautics Board and that that document is specifically referred to by number and reference in the report of the Board.

The Court: All right, counsel. You better see if you can locate Mr. Poppas. If you can locate Mr. Poppas then he can come in and testify as to the number of boxes that were hauled on that day. If you can't locate him then we will discuss the question whether you can get this into evidence.

Mr. Talbot: Very well, your Honor.

The Court: But I would suggest that you get out a subpoena right now. Don't wait until tonight. I suggest you get it out right now and try to locate Mr. Poppas and subpoena him in here.

Mr. Talbot: All right, we will endeavor to do that, sir.

The Court: Now, I will ask opposing counsel if he has any objection to Exhibit D. Exhibit D happens to be photographs of the wreck.

Mr. Nesbett: Nine photos. Yes, your Honor. Mr. Talbot showed me those. I object to those as not being authenticated in any fashion, your Honor, not identified as being representative of the scene of the crash.

The Court: Well, you have to lay a foundation

on D. Now, we have Exhibit E, which is a map. Do you have any objection to E? [71]

Mr. Nesbett: No; we have discussed that, your Honor, and I think it would be helpful to the Court and jury.

The Court: E may be admitted into evidence. Now we have F.

Deputy Clerk: Counsel hasn't seen F.

The Court: Will you look at F and see?

Mr. Nesbett: (Short pause.) Yes, I object to this one, too, your Honor. I suppose it's a part of the report that Mr. Talbot refers to as having been made by the CAB but doesn't indicate on the sheet anything other than a computation in connection with the Cessna 180. I don't know who made it, how authoritative it is and whether it applies to the particular 180 that we are concerned with here, whereas it was equipped and flown on the day of the flight.

The Court: Well, you're going to have to lay a foundation, aren't you?

Mr. Talbot: I think it does describe the Cessna 180 in question.

The Court: Supposing it does?

Mr. Talbot: Here again this is a record furnished us by the Civil Air Board from their files and I contend it's admissible under that statute without any more——

The Court: Well, there's nothing to show that it was furnished you from the files, Civil Aeronautics files, except your statement. There's nothing to show. [72]

Mr. Talbot: That is true, your Honor, and I'd be very pleased to be sworn and testify on that point at this time.

The Court: Well, you may be sworn and testify if you wish as to these two documents. That's C and F.

ARTHUR D. TALBOT

takes the witness stand for and on behalf of the Defendants, and, being first duly sworn, testifies as follows on

Direct Examination

Mr. Nesbett: Your Honor, I want to be entirely fair with Mr. Talbot and this is material testimony, your Honor. It's important testimony. Your Honor, this is evidence you might say that came out of a report made by a Safety Inspector for the Civil Aeronautics Board who is not here to testify what he put down on paper, is not subject to cross-examination his calculations, his correspondence or anything else in connection with what he did and reported on as a result of this accident. Now, if Mr. Talbot wants that to go in and takes the stand to make it admissible, if he is able to cure any objection, your Honor, I don't feel that I can waive my right to object to his arguing the case at the conclusion of the trial. I want to warn him now so that it wouldn't catch him unaware at the time he's ready to state his case to the jury.

Mr. Talbot: Your Honor, my testimony will have only to do with identification of documents.

The Court: I know, but what does the rule say?

(Testimony of Arthur D. Talbot.)

What [73] does the rule say? Can you testify and then argue? You're on the horns of the dilemma now, if you want to argue the case. What's the rule?

Mr. Nesbett: As I understand the rule—I am not able to quote it to your Honor—but if counsel voluntarily takes the stand on a material point he's not permitted to argue the case over opposing counsel.

The Court: Is that Alaska rule, or——

Mr. Nesbett: Let's see—whether it's Territorial laws or rule of the court or both—let me think. It's in the Territorial Code, your Honor, and it's under Civil Procedure and it's under arguments of counsel at the conclusion of the case, but it would be under the general heading, I believe, Civil Procedure in index of Volume. I think, your Honor, you have—under the rules, under supplement——

The Court: Maybe you can find it for me.

Mr. Nesbett: It would be an old, fat blue volume, numbered 3. That volume you have is a supplement.

The Court: Oh, you mean this?

Mr. Nesbett: Yes, sir.

The Court: All right. Well, Mr. Nesbett, you are more familiar with this than I am. Will you come up here and find it for me?

Mr. Nesbett: Yes, your Honor. (Counsel so complied.)

Mr. Talbot: May I see Exhibit C, your [74] Honor?

(Testimony of Arthur D. Talbot.)

Mr. Nesbett: This may be also in the local rules, your Honor.

The Court: Well, local rule 3(a)(6) says: "If counsel for either party offers himself as a witness on behalf of his client and gives evidence on the merits of the trial, he shall not argue the case to the jury unless by permission of the Court." Well, it's within the discretion of the Court, isn't it?

Mr. Nesbett: I understood it if he couldn't do it over the objection of opposing counsel. I could be wrong on that.

The Court: It doesn't say so.

Mr. Nesbett: Well, I don't see anything in the Territorial law on it so that must be the rule.

The Court: Well, it's purely within the discretion of the Court and if the purpose of the witness is to identify documents I would think my discretion would be to allow him to argue the case to the jury. I would think I would; I don't know what he's going to testify to, but I assume he's only going to lay a foundation for the identification of documents.

Mr. Nesbett: Which may result in the admission of the documents. I don't know—which, if it does, it amounts to bald statements of opinion on vital issues.

The Court: Well, we have got a jury here to try the facts of this case and the jury is not present. We will let [75] the counsel testify and at the proper time you can make the objection. I will rule upon the objection.

(Testimony of Arthur D. Talbot.)

Mr. Talbot: Your Honor, one reason I asked that the jury be excused was because I thought I might end up on the stand and I didn't want them to get the impression that anything in this case depended upon me as far as evidence goes.

The Court: You know there is a recent case that's come down from the Ninth Circuit that is relative to this particular rule and the Ninth Circuit points out that all documents, just because they are in the file, are not admissible, but I don't know whether that applies here or not.

Deputy Clerk: Now, so that my record may be straight, Mr. Talbot is testifying re Exhibits C and D?

Mr. Talbot: Right.

The Court: You have been sworn, haven't you?

Mr. Talbot: Yes, your Honor. May I give my testimony in narrative form?

The Court: I have no objection.

Mr. Nesbett: I have no objection.

By Mr. Talbot:

My name is Arthur D. Talbot. I am an attorney at law permitted to the bar of this court and I am of counsel for the Defendants in this case. I reside at 2300 Lord Baranof Boulevard in Turnagain, Spenard, Alaska.

On May 27, 1958, I addressed the following telegram [76] to Attorney Courtney Whitney, Jr., an attorney at law in Washington, D. C. This telegram

(Testimony of Arthur D. Talbot.)

is the only communication that I have ever had with Mr. Whitney in regard to this case. I, in fact, have never met Mr. Whitney but know him to be a friend of one of my associates. The telegram which I sent on May 27th reads as follows:

"Courtney Whitney, Jr., McCracken, Collins and Whitney, 1000 Connecticut Avenue, Washington, D. C. We represent underwriters at Lloyd's in the suit against Cordova Airlines which is set for trial June 2. Parties unable to locate original exhibits furnished to Civil Aeronautics Board. Urgently request you immediately secure and send us airmail special delivery at Anchorage original or copies of all exhibits attached to investigation report of CAB Investigator George R. Clark, dated February 26, 1956, except regulations which we possess. We also possess copy of Clark's report. The exhibits we need are in the custody of James N. Payton, Chief Bureau of Safety, Civil Aeronautics Board, Washington. Utmost. Thanks for your immediate attention to our request. Best regards. Boyko, Talbot and Tulin."

The following day, May 28, 1958, I received the following telegram:

"Boyko, Talbot and Tulin, Turnagain Arms Building, Anchorage. Exhibits being reproduced earliest mail May 29. Photographs possibly delayed. Good luck. Whitney." [77]

About an hour later, also on May 28, 1958, I received the following telegram addressed to our firm. The telegram reads as follows:

(Testimony of Arthur D. Talbot.)

"Exhibits mailed photographs tomorrow. Whitney."

On the following day, May 29, I received in the mail, airmail, special delivery, apparently from Mr. Whitney in Washington, according to the postmark and the address on the package, a group of photostats including Defendants Exhibits C and D for Identification. Two days later, on June 1—correction—on May 31, 1958, I received the photographs which have already been—strike that. They have not yet been received; that's the other exhibit. I threw away the cover under which the photostats came to me, but I saved the cover under which the photographs came on May 31, and I can show that to your Honor. I have in my possession a photostatic copy of the report of Investigator Clark and I have checked the exhibits which I have received from Mr. Whitney in Washington against that report. That's where Mr. Clark refers, for example, to Exhibit 10 as he does on page 6 of his report. Mr. Clark's report reads as follows:

"Records maintained by the Morrison-Knudsen Company reference Exhibit 10 indicate that the start of operations on 12/17/55 disclose there were 58 cartons of dynamite stored in the magazine Iliamna Bay airstrip and that on 12/17/55 Pilot Haley moved 30 cartons of dynamite on 2 flights, 14 cartons on [78] the first flight and 16 cartons on the second flight. The records further indicate that there were carried 16 cartons on board N1569 Charley for the flight involved in this accident. A

(Testimony of Arthur D. Talbot.)

physical check of the Iliamna Bay magazine by Morrison-Knudsen personnel subsequent to the accident disclosed that there were 12 cartons of dynamite remaining in the magazine. There were no other movements of explosives from the Iliamna Bay magazine other than those accomplished by Pilot Haley."

Similarly, your Honor, the photographs are referred to throughout Mr. Clark's report and reading the report and viewing the photographs it seems apparent, to me at least, that these are the photographs that Mr. Clark was talking about.

I have no further testimony on this point.

ARTHUR D. TALBOT

testifies as follows on:

Cross-Examination

By Mr. Nesbett:

Q. Mr. Talbot—may I see Exhibits C and D, your Honor? (The exhibits were handed to counsel.) You've never met this attorney in Washington, D. C., have you? A. Never have.

Q. You don't know him; he is just a friend of your associate?

A. Yes; we have one other case in which Mr. Whitney is doing some work for a client of ours.

Q. Have you attempted to locate Mr. John [79] Poppas?

A. I have. I have talked to Mr. Poppas in the last few days.

(Testimony of Arthur D. Talbot.)

Q. And you do not want to produce him as a witness. Is that the reason he is not called here to identify this letter which is Exhibit C?

A. As I interpreted the statute, perhaps wrongly, I thought that Mr. Poppas would be called by the Plaintiff if this letter were introduced.

Mr. Nesbett: Now, your Honor, this is——

The Court: Now, you go ahead and cross-examine the witness and then we'll argue about it a little later on.

Q. Now, as to the photographs, Exhibit D—wasn't there anything—how do you know these came from Clark's report except that you asked that you get—that this attorney get the exhibits from Clark's report? There's nothing on them to indicate they came from his report, is there?

A. Except that, and I haven't read it today, but as I looked at Clark's report it seemed to me that where he referred to the scene, that he referred to photographs or as he said, exhibits, which bore the same numbers that those photographs bear. I could be in error on that point, but I checked it at the time because I was interested.

Q. The photos themselves had nothing attached to them and certainly they aren't marked to indicate they're part of the exhibits in his report?

A. There's nothing on the photographs to indicate they are [80] original at all.

Mr. Nesbett: I have no other questions, your Honor.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

Mr. Nesbett: I would like to be heard briefly, your Honor.

The Court: Well, just a minute, please. 1732 (b) says: "If any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced * * * the original may be destroyed in the regular course of business * * * Such reproduction, when satisfactorily identified, is as admissible in evidence as the original * * *"

Well, now, let's go back and read that again. Now, I don't know—"if any department or agency of the government in the regular course of business has kept or recorded any memorandum," etc., "of any act, transaction, occurrence, or event, and in the regular course of business has caused the same to be recorded, copied," etc., "the original may be destroyed."

And if the original is destroyed, then the copies may be used. Now, where does it say these business records are admissible? Now, section 1733 talks about government records [81] and papers and says, "Books or records of account of minutes of proceedings," etc. And then it says, "Properly authenticated copies or transcripts of any books, records,

papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

We have this sort of a situation here. We have an investigating agency of the Government, an investigating agency of the Government goes out and interviews people, takes statements and then makes a report. Now you want that report to be introduced into evidence without the parties who made the statement being in the court, without being subject to cross-examination. I don't think the rule goes that far. I just don't think it goes that far.

Mr. Talbot: I agree with your Honor that the proposition I advanced is enough to make a lawyer or judge—to make his hair stand on end, but I think that this is clearly what the Congress intended.

The Court: Well, now, what does the Court say? What do the cases say? I found out you can't rely upon the statute because the Courts sometimes interpret the statute entirely different.

Mr. Talbot: Well, now, this Third Circuit case, your Honor, is in a case which was involving civil liability for an explosion of a tank. The District Judge kept out the report and we are not going that far. We are not offering the CAB report [82] with its opinion and conclusion. We are not offering that.

The Court: But you are offering these two documents and one document says there was hauled on the day of the crash 16 cartons of dynamite and the other document says that the weight of the air-

craft was so much, and the useful load was 865.4 pounds. Why, how can the Plaintiff meet this document by any kind of evidence at all?

Mr. Talbot: Well——

The Court: We don't know who made the investigation, who made the weights, when they were made. I called your attention to the Ninth Circuit case that came down in the past year that went into quite an extensive discussion as to what was admissible under this section. That is under subsection (a). That has nothing to do with public documents but private documents.

Mr. Talbot: Well, your Honor, in this case the Third Circuit says the report—that is the Bureau of Mines report—which the Plaintiff offered had been prepared in obedience to the above statutory provisions, the ones that required the Bureau of Mines to make an investigation. Same thing here. Civil Aeronautics Board required by the statute to make an investigation, and in fact there's another provision in the Civil Aeronautics Act which makes it a misdemeanor for any person to refuse to answer any lawful inquiry of the Civil Aeronautics Board—a legal duty to make this information available.

The Court: Have you Shepardized the two decisions you [83] presented to me?

Mr. Talbot: No, sir. I have looked at the annotations to the statute and I find nothing later or to the contrary on this business of these—this type of exhibit, but I did run across a Ninth Circuit case.

The Court: In order to have the document admitted you certainly have got to lay a foundation and I don't think you lay a foundation by presenting the documents and say, "I got these from the person who got them from the Civil Aeronautics Board." I don't think that is a foundation. Of course it's true that on Exhibit C we have here a certification—says, "I have compared this and certify it to be a true copy. Bureau of Safety Investigation."

Mr. Talbot: Your Honor, maybe we can do this: I can withdraw F. That is really the bad one.

The Court: You don't have to withdraw it. It's only marked for identification. It's here. Let it stay in the record for identification.

Mr. Talbot: Well, I won't offer F. I think C, that C does have enough earmarks of authenticity to entitle it to be admitted.

The Court: Well, I don't agree. I don't agree with C. However, I want to read your two cases you have got here and——

Mr. Talbot: And on the statute, your Honor stopped [84] reading one sentence too soon.

The Court: I did?

Mr. Talbot: On 1732.

The Court: Now, you read it the way you think it ought to be read; maybe I didn't read it right.

Mr. Talbot: Well, the preceding sentence provides that the original may be destroyed. And your Honor thought that that meant that only where the original had been destroyed would a copy be received. Not so. The next sentence says, "Such re-

production, when satisfactorily identified, is as admissible in evidence as it is in any judicial proceeding * * * whether the original is in existence or not * * *"

The Court: Well, that's perfectly true. That if the original has been destroyed and then these copies are admissible, but that's not the problem here.

Mr. Talbot: But we don't care whether it's been destroyed or not as long as we have a copy. Now, the following section, 1733, has to do with the admissibility of Federal, Government records in a State court, and that is where certification is required.

The Court: What do you mean by State court? Where do you see State court?

Mr. Talbot: Well, 1732 starts out by saying, "In any court of the United States and in any court established by Act of Congress," which would include this court, and then it has [85] detailed provisions for how you get Government documents in evidence.

The Court: I know, but where does 1733 say anything about a State court? This is Federal rules. I assume it applies to Federal courts, not State courts.

Mr. Talbot: I think not, your Honor. The annotations that I read under 1733 were largely, as I recall, State court decisions.

The Court: You just cannot rely upon annotations. I remember when I was on the Superior Court that I rendered a decision decided upon a

syllabus and then after I got to looking in the case I had to come back and reverse myself because the syllabus didn't follow the ruling of the case. And so you just cannot depend upon annotations. Now, certainly there must have been some decisions upon this particular statute. You have given me two. I am going to read them and Shepardize them.

Mr. Nesbett: I'd be curious to ask counsel, your Honor, through the court, if in the Bureau of Mines case the report they submitted was not a report based upon observations or tests or field trips —examinations made by officials? In other words, observations that they had made in the regular course of business, such as is mentioned in the statute, if those weren't the facts in that case?

Mr. Talbot: The Court of Appeals said, "The report is no less admissible because it contains conclusions which are [86] based upon hearsay evidence as well as upon observations."

The Court: We don't have a report here; all we have is a document.

Mr. Talbot: That is true, your Honor, which is part of the official record kept in the course of business by CAB. Their business is investigation as well as——

The Court: Well, you haven't got any testimony to that effect. All you have is you telegraphed to a lawyer in Washington to get you these records and he wrote a—wired you and said he had them and sent them to you, but that's the only testimony we have.

Mr. Talbot: Well, I didn't have time to go to Washington and I didn't have——

The Court: Well, that may be perfectly true.

Mr. Nesbett: Your Honor, I'd like to pass to the Court to read in the time you read those two decisions, procedure of regulations of promulgation of part 3, 11, put out by the Civil Aeronautics Board regarding the testimony of Safety Agent such as Mr. Clark, who made this examination or investigation and report, and the limitations on his ability to testify before this court. Your Honor, he, Mr. Clark, himself, couldn't take the stand and testify as to a matter of opinion except subject to these limitations. This appears to me to be attempting to get at indirectly what Mr. Clark couldn't substantiate sufficiently to get in himself. [87]

The Court: Well, it's nearly 3:00 o'clock. I think we'll take a recess until 15 minutes after 3:00 o'clock.

(Whereupon, at 3:15 o'clock p.m. court reconvenes following a 15-minute recess, and the following proceedings were had.)

The Court: Sorry that I haven't had very much time to resolve this problem. I wish I could turn to that Ninth Circuit case that's come down. I may be able to find it after recess today, but I can't—but at the present time I am going to rule that the exhibits are inadmissible. However, I may change my mind before the end of the case and allow you to introduce them, but I don't think that there is—sufficient foundation has been laid on the exhibits.

However, I am not foreclosing the fact that I may change my mind. Now, can we call down the jury?

Mr. Talbot: Yes, your Honor.

The Court: Call down the jury.

(Whereupon, the bailiff recalls the jury and the jury returns to the courtroom.)

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

The Court: I'd like to ask counsel a question. I notice that one of the jurors is attempting to keep notes. Is it permissible to keep notes in this court by the jury? I [88] usually never allow it in my court because I want them to pay attention to the evidence and not to notes they are trying to keep.

Mr. Nesbett: Your Honor, in 12 years I can't say that the question has ever come up to my knowledge. I don't know.

Mr. Talbot: I don't know either, your Honor.

The Court: Well, I am going to request the jury not to keep any notes or try to keep any notes as far as the testimony is concerned. You can rely upon your recollection. I don't want you to go into the jury room and compare notes and say, "I took this down," and so forth and so on.

All right, call your next witness.

Mr. Talbot: Call Mr. King.

CLARENCE E. KING, JR.

called as witness for and on behalf of the Defendants, and, being first duly sworn, testifies as follows on:

Direct Examination

By Mr. Talbot:

Q. Please state your full name, Mr. King?

A. Clarence E. King, Jr.

Q. Where do you live, Mr. King?

A. 1701 Aleutian Street, Anchorage.

Q. You work for Morrison-Knudsen Company?

A. I do.

Q. What is your present position with that [89] firm? A. District office manager.

Q. Did you work for Morrison-Knudsen in December, 1955? A. I did.

Q. What was your position with Morrison-Knudsen then?

A. I was assistant project manager of the White Alice project.

Q. Did that include the work which was done at Big Mountain? A. Yes.

Q. Are you familiar, Mr. King, with the procedures which were followed by Morrison-Knudsen Company in December of 1955 with regard to the accountability of a remote site such as Big Mountain for materials and supplies furnished to that site? A. Yes.

Q. Can you tell us whether or not supplies and materials designed for Big Mountain, once they commenced to move in that direction, would have been charged out to that site?

(Testimony of Clarence E. King, Jr.)

A. Yes; there's quite a change in the paper work tracing them from wherever they started until they got to the site.

Q. Now, this was done in the regular course of your business? A. Oh, yes.

Q. Now suppose, Mr. King, that a portion of merchandise or equipment charged out to the remote site at Big Mountain were destroyed by an accident such as an airplane crash—in the regular course of business would any report such as an Over, Short and Damaged Report have been made by the [90] officials at the remote site to the office in Anchorage?

A. It was required OS&D, Over, Short and Damaged Report be made.

Q. And were those Over, Short and Damaged Reports made and kept in the regular course of the business at Morrison-Knudsen? A. Yes.

Q. Now, I'll ask you if you have brought with you at my request and in response to a subpoena, a certain Over, Short, and Damaged Report dated December 18, 1955? A. Yes; I have.

Q. And do you have that document before you?

A. I do.

Q. Can you tell us who at the Morrison-Knudsen Company is the official custodian of that document?

A. I am now. I have all the files.

Q. Was the document that you have before you taken from your files? A. Yes.

Q. Was that document made and kept in the

(Testimony of Clarence E. King, Jr.)

regular course of business? A. Yes.

Q. Does that document refer to the loss of 16 cases of dynamite?

Mr. Nesbett: I will object to the contents of the [91] report. It hasn't been shown to counsel.

The Court: Well, he's not asking for the contents report, he's only asking him if it refers to something. He's trying to pinpoint the document.

Mr. Nesbett: It comes very close to referring to the contents of the document, your Honor, without having——

The Court: Overruled.

Mr. Talbot: Will you read the question back, please?

(Thereupon, the reporter read back question, Line 23, Page 91.)

A. It does.

Mr. Nesbett: May I have that document, please? (The document was handed to counsel.) May I ask the witness a question or two, your Honor?

The Court: Yes.

Mr. Nesbett: Mr. King, was this Over, Short, and Damaged Report submitted by the signatory, Mr. C. A. Wilson?

A. From the face of it, it was. I wouldn't know, personally?

Mr. Nesbett: You wouldn't know personally?

A. No; I wouldn't have received it from him.

Mr. Nesbett: Did you received it from him, or from whom did you receive it?

(Testimony of Clarence E. King, Jr.)

A. It was in the files of Contract 1787.

Mr. Nesbett: Then you know nothing about it except you found this in the files when you were asked to look, is that [92] correct?

A. That's correct.

Mr. Nesbett: To whom is this OS&D Report directed? I notice no direction at the top of the page.

A. Those reports were prepared and a number of copies which were distributed to a number of different departments. That particular copy, I don't know which department it was distributed to.

Mr. Nesbett: But did the original—where is the original? I notice this is a typewritten copy.

A. I wouldn't know of my personal knowledge. The original was supposed to be submitted to the Western Electric Company. Whether it was or not, I don't know.

Mr. Nesbett: Then this OS&D Report in the ordinary course of business would have been directed to Western Electric, is that correct?

A. In the ordinary course of business we would write Western Electric a letter saying "so and so has happened and here's an Over, Short, and Damaged Report saying what happened."

Mr. Nesbett: And was Mr. Wilson, to your knowledge, an employee of Morrison-Knudsen Company?

A. Yes; he was the site clerk at Big Mountain at this time.

Mr. Nesbett: In December of 1955?

(Testimony of Clarence E. King, Jr.)

A. Yes.

Mr. Nesbett: Do you know where he is [93] now?

A. He's at Driftwood Bay.

Mr. Nesbett: And where is that, sir?

A. It's near Dutch Harbor.

Mr. Nesbett: Is he still working for Morrison-Knudsen Company?

A. He is working for a joint venture in which we are participants.

Mr. Nesbett: How long have you been with Morrison-Knudsen?

A. Since 1951.

Mr. Nesbett: And where were you employed in 1955, Mr. King?

A. In Anchorage.

Mr. Nesbett: Do you offer this?

Mr. Talbot: Yes, your Honor, I offer it as Defendants Exhibit G.

Mr. Nesbett: I object, of course, your Honor, to the admission of the hearsay, explanatory remarks made at the bottom of the page. I have no objection to the admission of the top portion of the OS&D Report. If your Honor will look at the report, I think your Honor will see what I mean.

The Court: I'd like to ask the witness a question or two. Would you testify that this memorandum was made in the regular course of business?

A. Yes. [94]

The Court: And that the memorandum was made

(Testimony of Clarence E. King, Jr.)

at the time of the transaction or occurrence or within a reasonable time thereafter?

A. Well, I believe it's dated substantially the same date as the accident. I have no personal knowledge of when it was made.

The Court: Well, as far as you know it was made on the date of the accident or immediately thereafter?

A. I have no reason to believe otherwise.

The Court: Objection overruled. It may be received in evidence.

Mr. Talbot: I have no further questions of this witness, your Honor.

The Court: What is that, G?

Deputy Clerk: G.

The Court: Any cross-examination?

Mr. Talbot: Oh, I beg your pardon, your Honor —I do have——

Q. (By Mr. Talbot): Mr. King, have you also at my request brought with you certain flight reports furnished Morrison-Knudsen Company by Cordova Airlines? A. Yes.

Q. Are those flight reports having to do with a certain airplane known as Cessna 1569 [95] "Charley"? A. Yes.

Q. And they are dated in November and December of 1955? A. Yes.

Q. Now, are you familiar with the procedures followed by Morrison-Knudsen Company when they have occasion to charter an aircraft?

A. Yes.

(Testimony of Clarence E. King, Jr.)

Q. In the regular course of the business of chartering an aircraft, can you tell us whether or not daily flight reports or manifests are received from the airline?

A. Yes; it's required that each flight be supported by a manifest or flight report, some written document.

Q. Are you the official custodian of these flight reports? A. Yes.

Q. Were they made and kept in the usual course of business by Morrison-Knudsen?

A. They were kept by Morrison-Knudsen; I believe they are actually made by Cordova Airlines.

Mr. Talbot: May I see the documents, please? (The documents were handed to counsel, who showed them to opposing counsel.)

Mr. Nesbett: Who made these flight reports, Mr. King?

A. I have no knowledge.

Mr. Nesbett: Did you make them up in your office?

A. I have no knowledge. [96]

Mr. Nesbett: Are these copies of other flight reports that are in your office?

A. They are not copies of other flight reports, no. They are the file copies which are in the files. The source of them is unknown to me.

Mr. Nesbett: But were your duties—did your duties require you to be concerned with flight reports such as these in December of 1955?

A. Not my personal duties, no; the duties of some of my employees.

(Testimony of Clarence E. King, Jr.)

Mr. Nesbett: Then you, yourself, had nothing to do with flight reports that might have been submitted by Cordova, is that correct?

A. No; I would never see one.

Mr. Nesbett: Well, you don't know whether these were submitted by Cordova Airlines itself or were made from copies supposedly coming from Cordova, do you?

A. That's correct.

Mr. Nesbett: You don't know that?

A. I don't know.

The Court: All you know is you found those in the files?

A. That is correct.

Mr. Nesbett: And had you ever had occasion then to examine Cordova Airline flight reports prior to being subpoenaed [97] by Mr. Talbot to do so?

A. No.

Mr. Nesbett: Did you in your search look for other flight reports of Cordova Airlines?

A. No. These were the particular ones that the gentlemen were interested in.

Mr. Nesbett: That's all, your Honor. I will object to their admission.

The Court: They haven't been offered yet.

Mr. Talbot: I offer them as Defendants Exhibit H.

The Court: May I see the documents?

Mr. Talbot: Yes, your Honor; 4 flight reports

(The documents were handed to the Court.)

(Testimony of Clarence E. King, Jr.)

The Court: May I have a stipulation now of the parties before I rule? Can it be stipulated that the pilot was H. Haley?

Mr. Nesbett: That's right. Yes, sir, we so stipulate.

Mr. Talbot: Yes, your Honor, we so stipulate.

The Court: And the date of this accident was when?

Mr. Nesbett: December 18, 1955, your Honor.

The Court: December?

Mr. Talbot: Yes, your Honor.

The Court: Well, now, these flight reports are dated November. The last one is December 5.

Mr. Talbot: Yes, your Honor. May I——

The Court: Why is it material? [98]

Mr. Talbot: Dispute between the parties as to how much cargo was carried on the flight in question. We think that these flight reports may be relevant to show, as we contend that Pilot Haley frequently overloaded his plane and that therefore it's not entirely beyond the realm of possibility that he overloaded it on the flight in question.

The Court: Objection sustained. We cannot try a case upon possibility or conjecture. The fact that they may have overloaded the day before the accident doesn't mean that it was overloaded on the day of the accident.

Mr. Talbot: Very well, your Honor.

The Court: They may be marked for identification only.

Mr. Talbot: Thank you, your Honor. I have no further questions of Mr. King.

Mr. Nesbett: I have no cross-examination.

The Court: Step down. May this witness be excused?

Mr. Talbot: Yes, your Honor.

The Court: Mr. Nesbett?

Mr. Nesbett: Yes, your Honor. I'm sorry.

The Court: You may be excused.

(Thereupon, the witness retired from the stand.)

The Court: Call your next witness.

Mr. Talbot: Call Mr. Lindemuth.

ALBERT N. LINDEMUTH

called as a witness for and on behalf of the Defendants, and, [99] being first duly sworn, testifies as follows on:

Direct Examination

Mr. Talbot: I'm sorry, your Honor—before Mr. Lindemuth assumes the stand I'd like to call Mr. Smith for one question.

The Court: All right. Mr. Smith, will you come forward?

MERLE K. SMITH

resumes the witness stand and testifies as follows on:

Cross-Examination

Mr. Talbot: I should like to call upon Mr. Nesbett to produce for me at this time the original Form 337 for the aircraft in question, dated December 4, 19—pardon me—November 4, 1955.

Mr. Nesbett: I hand to Mr. Talbot Form 337,

(Testimony of Merle K. Smith.)

your Honor. It is not the original but it is a carbon copy which was retained by Cordova Airlines in the usual course of business.

Mr. Talbot: And I hand the document to the witness, if I may.

By Mr. Talbot:

Q. Mr. Smith, I will ask you to examine this document and tell me if it is a record made and kept by Cordova Airlines having to do with the maintenance of Cessna 1569 "Charley"?

A. It is.

Q. The document refers, does it not, to the occasion of November 4, 1955, when Federal wheel-skis were installed on this [100] airplane?

A. It does.

Q. Please refer to this document and tell us what the empty weight of Cessna 1569 "Charley" was after the skis had been installed?

A. If I'm looking at this right it says 1,612 pounds.

Q. Where does it say that, Mr. Smith?

A. Well, on the bottom it has three—it has wheels, skis and floats and each one of them is listed in empty weight.

Q. Now refer to the column——

The Court: Do you have any knowledge except what's in that document?

A. Not much. I mean I'm familiar with these forms but actually I don't know too much about it.

The Court: Well, I think the document is the

(Testimony of Merle K. Smith.)

best evidence, rather than letting the witness read the document.

Mr. Talbot: Very well, your Honor. We do not vouch for the entire document. However——

The Court: Well, I'm sorry; if the document goes in at all it has to go in in its entirety. You can't pick out just what you want and disregard the rest. Now this witness doesn't know anything about what's in the document except what the document says itself. Now, I don't think the witness should be allowed to read from the document unless the document is in evidence. [101]

Mr. Talbot: Very well, your Honor.

Mr. Nesbett: I will stipulate that it can go in evidence, your Honor.

Mr. Talbot: I will so stipulate, your Honor.

The Court: It may be received as Defendant's Exhibit I.

Mr. Talbot: I have no further questions of Mr. Smith.

The Court: Any questions?

MERLE K. SMITH

testifies as follows on

Redirect Examination

By Mr. Nesbett:

Q. What is that form called, Mr. Smith?

A. Form 337.

Q. And is that a form required to be kept by

(Testimony of Merle K. Smith.)

Cordova Airlines or any airline, by the Civil Aeronautics Authority?

A. It is. You keep the original in the airplane and a copy in your files.

Q. Was that form prepared on the plane in question in this lawsuit just prior to its traveling to Iliamna to work on this charter business?

A. Yes, it was.

Q. To whom is that report submitted and why?

A. That's submitted to the CAA.

Q. And what is the purpose of the report?

A. So that they may inspect the form and know what work, repairs [102] or alterations or what not is being done on the airplane.

Q. Now, with respect to this Cessna 180, you had a particular reason for submitting the Form 337 on it as of the date of submission of that form, didn't you? A. Yes.

Q. And what was that reason?

A. That was the installation of the ski-wheel combination.

Q. And was that the reason you submitted that particular Form 337? A. Yes.

Q. You didn't do the work yourself—it was done by one of your mechanics, wasn't it?

A. It was done in the shop. I was around there seeing it being done.

Q. And it's signed by your chief mechanic at Cordova, isn't that right? A. That's right.

Mr. Nesbett: That's all.

Mr. Talbot: No further questions.

The Court: You may step down.

A. Thank you.

(Thereupon, the witness retired from the stand.)

Mr. Talbot: Call Mr. Lindemuth.

ALBERT N. LINDEMUTH

resumes the witness stand, and having previously been sworn, [103] testifies as follows on

Direct Examination

By Mr. Talbot:

Q. Please state your full name, Mr. Lindemuth.

A. Albert N. Lindemuth.

Q. And your occupation? A. Pilot.

Q. And where do you live?

A. 2316 East Fifth Avenue.

Q. How long have you been a pilot?

A. Since 1939.

Mr. Nesbett: Your Honor—excuse me, maybe I'm way off base, but was Mr. Lindemuth sworn?

Deputy Clerk: Yes.

The Court: Yes, he was sworn before Mr. Smith took the stand.

Q. (By Mr. Talbot): You live where, sir?

A. 2316 East Fifth.

Q. When did you first become a pilot?

A. 1939.

Q. About how many hours' flight do you have as a pilot?

A. Between 12 and 13,000 hours.

(Testimony of Albert N. Lindemuth.)

Q. What is your present business, Mr. Lindemuth?

A. I'm in the aircraft charter and contract business. [104]

Q. In connection with your business, do you have occasion to repair aircraft? A. Yes, sir.

Q. Have you ever had occasion to install or supervise the installation of whee-skis on an aircraft? A. Yes, sir.

Q. Can you estimate for us about how many times? A. 4.

Q. About 4? A. Yes, sir.

Q. Have you ever owned a Cessna 180?

A. Yes, sir.

Q. Have you ever flown a Cessna 180 as pilot?

A. Yes, sir.

Q. About how many hours?

A. Approximately 300.

Q. Now, for about how many years has the repair and maintenance of aircraft been part of your business?

A. I used that wholly as a business for approximately 3 years and have been connected with it, of course, in association with the other aircraft business since 1939.

Q. Have you ever had occasion upon completion of a repair or alteration to an aircraft to compute or figure the legal weight or useful load?

A. Yes. [105]

Q. About how many times have you made such computations?

(Testimony of Albert N. Lindemuth.)

A. I do that approximately every time you work on an airplane.

Q. Well——

A. I couldn't even guess, other than say—I'd say a hundred times. I know I have worked useful load problem many times.

Mr. Talbot: I would ask Mr. Nesbett to produce for us the CAA Manual for this aircraft. (The document was handed to counsel.) I would ask that Mr. Nesbett stipulate with me that the document which he has handed me is the CAA Approved Manual for Cessna 1569 "Charley" and that it may be received in evidence.

Mr. Nesbett: I will so stipulate, your Honor.

Mr. Talbot: I offer it, then, as Defendant's Exhibit J.

The Court: It may be received in evidence.

Deputy Clerk: These are excerpts from the Manual?

Mr. Talbot: I believe that's the entire Manual.

Deputy Clerk: I thought they were excerpts.

Q. (By Mr. Talbot): Mr. Lindemuth, I hand you Defendant's Exhibit J, the Manual, and ask you to examine that. (Short pause.) I would also like to hand the witness Exhibit I. I hand you Defendant's Exhibit I, Mr. Lindemuth. Now, Mr. Lindemuth, Defendant's Exhibit I, which is this Form 337, states on the back near the top, "Sk Model AWB 2500 A," and then is given a seria number. Do you see that, sir? [106]

A. Yes, sir.

(Testimony of Albert N. Lindemuth.)

Q. And above that it says that these were Federal wheel-skis. Do you see that? A. Yes, sir.

Q. Are you familiar with any CAA approved specifications with regard to this particular type or model of Federal wheel-skis? A. Yes, sir.

Q. Do the specifications for these wheel-skis have anything to say about the maximum of allowable gross weight of an aircraft upon which they are installed? A. Yes, sir.

Q. Can you tell us what the maximum allowable gross weight is on this model of Federal ski-wheel?

A. Would you like to have me explain that to the Court or do you just want me to answer the question?

Q. Be pleased to have you explain it.

A. On this particular installation the gross weight is 2550 pounds.

The Court: What do you mean, 2550 pounds?

A. Sir, the aircraft manufacturer approved this Federal ski-wheel combination as part of the manufacturing of the airplane. If I were to put that on an airplane myself, or anyone were to put it on, outside of the manufacturer, it would be 1250 pounds or gross weight of 2500 on this. On this particular manufacture, it's 2550 pounds. I [107] found that out this morning. I checked myself, back——

Q. Now, Mr. Lindemuth, referring again to Defendant's Exhibit "I" which you have before you, can you tell us what that shows on the back with

(Testimony of Albert N. Lindemuth.)

regard to the empty weight of this aircraft before the skis were installed?

A. It says 1541 pounds.

Q. And what does it show with respect to the empty weight of the aircraft after the wheel-skis were installed? A. 1612.

Q. Isn't there a figure up there, 1671.6?

A. Uh huh, yes.

Q. Can you explain for us if you can, the difference between 1671.6 in one place and 1612 in the other?

A. I could probably explain it. The actual weight of this installation as listed in the Cessna specifications is 108 pounds.

Q. And that includes what?

A. That includes the skis, the hydraulic cylinders that operate the skis, and the pump itself, the hydraulic pump and the necessary rigging to attach these skis according to a Cessna drawing.

The Court: You mean to say that 108 pounds would be added to 2550?

A. No, sir, that doesn't change your gross weight. That comes out of that 2550. [108]

The Court: You take it out instead of add it in?

A. That 2550 is something you can't exceed.

The Court: Now, listen, the jury is the one that is going to decide this, not me. I am just trying to find out what your testimony is.

A. My testimony is that that gross weight is

(Testimony of Albert N. Lindemuth.)

2550 pounds and the weight of this ski-wheel installation is 108 pounds.

The Court: So that would bring the gross weight down?

A. No, it doesn't affect the gross weight. The only thing it affects is the bottom figure down there, the useful load.

The Court: You take 108 out of the useful load?

A. Yes, sir, that's the only place there is for that to come.

The Court: Is this 108 pounds in addition to the wheels? This is ski-wheels, now. You mean to say you take off the wheels and then put on ski-wheels?

A. You use the same wheels, normally.

The Court: Well, you mean it adds 108 pounds when you put on the skis, is that right?

A. Yes, sir.

Q. (By Mr. Talbot): Tell us, Mr. Lindemuth, how this Federal ski-wheel arrangement works and what the purpose of it is?

A. Well, the purpose of it is to give the utility, airplane being able to land on the snow or ice surface and—as well as the runway, a dry runway—and it works on the [109] principle of the hydraulic pump working on the cylinders that are attached to the skis, will pump the skis either up or down as you desire, according to the runway you desire to land on.

Q. Now, Mr. Lindemuth, I wonder if you could come down to the blackboard here and bring those

(Testimony of Albert N. Lindemuth.)

exhibits with you? (The witness so complied.) I believe your testimony is that with this installation the maximum gross load, gross weight possible for this aircraft is 2550 pounds? A. Yes, sir.

Q. Now, the empty weight after the skis were installed was what, according to this Form 337?

A. Is this necessary? (Indicating figures on blackboard.)

Q. No, you can erase that and we'll start over. You can erase the top part, too, Mr. Lindemuth, and just use the whole blackboard.

A. 1649 would be the empty weight of the aircraft. (Indicating figures on blackboard.)

The Court: Well, you said 1541 prior when the skis were put in, when you said after the skis it was 1612? A. That is the empty weight, sir.

The Court: What is the 1541 you put up there?

A. That was the original empty weight before they added this 108 pounds of ski-wheels.

The Court: Then the empty weight is 1649?

A. 1649. [110]

Q. (By Mr. Talbot): Now, Mr. Lindemuth, I notice at the top of Exhibit G, on the back it states as follows: "Skis were skinned with 26-gauge galvanized iron for a weight increase of 13 pounds per ski." Do you see that? A. Yes, sir.

Q. Now, can you tell us whether or not this 13 pounds per ski of iron which was added would be in addition to the 108 pound figure you have given?

(Testimony of Albert N. Lindemuth.)

A. Yes, it would be in addition to the 108 pounds.

Q. And how many pounds more would it make?

A. 26 pounds.

Q. Would you add that to the empty weight, then? (Short pause.) You place the figure of 1675 pounds on the blackboard. Now, is it your testimony that interpreting this form, that that would be the empty weight of the airplane with the wheels as installed? I mean the skis as installed?

A. According to these figures that would be it.

Q. Now, what would be the maximum allowable useful load for this aircraft?

A. 825 pounds.

The Court: Better subtract that again. (The witness so complied.) Still doesn't add up. We don't want to drop a box of dynamite here now, we want to get it all in. [111]

A. You say I was wrong? I still say it's 14, take away 6, is 8, isn't it?

Q. (By Mr. Talbot): Start over, Al. (The witness so complied.) That's better.

A. 875 pounds.

Q. Now, Mr. Lindemuth—oh, I wish you would have left those figures up there. Would you put them back? (Short pause.) Very well. Now, Mr. Lindemuth, in computing the useful load that a plane's actually carrying when it's in service, what items are taken into consideration?

A. Well, the useful load is the difference between the empty weight and the allowable gross

(Testimony of Albert N. Lindemuth.)

weight, and everything that goes into the airplane is included in that.

Q. Now, does your empty weight include gasoline? A. Negative.

Q. Does it include oil? A. Negative.

Q. Does it include the pilot? A. Negative.

Q. Does it include any cargo which may be carried? A. No.

Q. Now, can you tell us how much oil would be normal for a Cessna 180 to carry?

A. It would be normal that he would be carrying 10 quarts of oil. The plane will hold 12, but the normal operation is [112] to put 10 in.

Q. Can you tell us how much 10 quarts of oil would weigh?

A. 10 quarts would be 2½ gallons; approximately 20 pounds, 19 pounds.

Q. Would you write 19 pounds on the board, please, a separate column? (Short pause.) Now, is there any custom or practice or regulation with regard to the weight of the pilot? Do you weigh each pilot separately before each flight, or is there some standard figure that is taken?

A. 170 pounds is the standard figure.

Q. Would you put that down, please? (Short pause.) Now, how much gasoline does a Cessna 180 that has not had its tanks modified hold?

A. 55 gallons; it holds 60 gallons but there's 5 gallons unusable that is included in the empty weight of the aircraft.

(Testimony of Albert N. Lindemuth.)

Q. The 5 gallons is included in the empty weight?

A. The unusable gasoline is included in the empty weight.

Q. Very well. Then there would be 55 gallons of usable gasoline? A. Yes.

The Court: If it was full?

A. If it were full, 55 gallons.

Mr. Talbot: I ask Mr. Nesbett to produce for me the log for this aircraft for December 17, 1955. (The document was handed to counsel.) I'd ask Mr. Nesbett to stipulate with [113] me that this document is the copy of the pilot's log for December 17, 1955, and that it may be received in evidence as Defendant's Exhibit K.

Mr. Nesbett: I will stipulate that that is the pilot's log for December 17, but I don't think I should stipulate that it should go into evidence. I don't know how he would connect that up as being indicative of the weight or the operation of the airplane on the following day, and——

The Court: Well, I think maybe this is a question for the jury to consider. Of course the plane was being operated—it might show how much gasoline was in the day before, and some computation may be made as to the amount of the gasoline he had at the time of the crash. Objection overruled; it may be received in evidence.

Deputy Clerk: This is Defendant's K?

Mr. Talbot: Yes, ma'm.

Q. (By Mr. Talbot): Mr. Lindemuth, I hand

(Testimony of Albert N. Lindemuth.)

you Defendant's Exhibit K and ask you if you can tell from that log for December 17, how much gasoline the pilot says he had on board when he started out that day? A. It says 55 gallons.

Q. And is there any entry there of gasoline added by the pilot at the end of the day on the 17th?

A. It says 35 gallons. [114]

Q. Can you tell from examining that log how many hours this plane flew on December 17, 1955?

A. 2 hours and 5 minutes—no, wait a minute—we got some up here at the top—2 hours and 50 minutes.

The Court: Well, would you take it then that in 2 hours and 50 minutes he used up 35 gallons of gas? A. Yes, sir.

Q. His consumption of gasoline then would have been approximately 12 gallons per hour, would it not? A. Yes.

Q. Now, let's assume, Mr. Lindemuth, that on the 18th the pilot started out with full tanks or 60 gallons and that he flew for an hour and a half before he crashed. How many gallons of gasoline would he have had on board when he crashed?

A. 37.

Q. If you assume—strike that. I believe you are absolutely right, Mr. Lindemuth, 37 gallons. And Mr. Nesbett and I have stipulated, Mr. Lindemuth, that this gasoline, whatever it was on board, weighed 6 pounds per gallon. So would you make that computation as to how much gas weighed?

A. 222.

(Testimony of Albert N. Lindemuth.)

Q. Now, Mr. Lindemuth, we'll make a further assumption and that is that the aircraft had on board 16 cases of dynamite and that each case weighed 53 pounds. [115] A. 848.

Q. That would give you a figure of 848 pounds for the dynamite? A. Yes.

Q. Then would you add the total of the 4 items that you have: the oil, the pilot, the gas and the dynamite? A. 1259.

Q. And assuming that your figures are correct for the gas and the dynamite, how much if any was the plane overloaded?

A. As far as those figures (indicating), 384 pounds.

Q. Very well. You may resume the stand, Mr. Lindemuth. And you better take those exhibits with you. Mr. Nesbett may want to cross examine you with respect to them. (The witness so complied.)

Mr. Talbot: You may examine, sir.

ALBERT N. LINDEMUTH

testifies as follows on

Cross-Examination

By Mr. Nesbett:

Q. Mr. Lindemuth, what was the basis for your statement in saying that the weight of the pilot is calculated regularly and routinely at 170 pounds?

A. That's the standard figuration of average human weight, I believe, Mr. Nesbett.

Q. Then in your calculations you have simply

(Testimony of Albert N. Lindemuth.)

called his weight as 170 pounds because the CAA does that routinely in setting [116] specifications, isn't that right? A. Yes, that is correct.

Q. Did you know Herbert Haley, a pilot in this area in 1955? A. Yes, I know Mr. Haley.

Q. He didn't weigh 170 pounds, did he?

A. No, sir, not to my recollection he didn't.

Q. Now, Mr. Lindemuth, your figures there on the board, the bottom set of figures indicate, based on an assumption that Mr. Talbot asked you to make, that there could have been an overload of 384 pounds if 16 cases of dynamite had been carried, plus the pilot's weight, the gasoline and the oil, is that correct? A. Yes.

Q. Did the form you were looking at indicate anything in connection with equipment that had been removed from the airplane for the flight?

A. The form did not indicate anything that may have been removed from the airplane.

Q. Now, Mr. Lindemuth, would you step down to the blackboard again, please? (The witness so complied.) I believe you testified that you are familiar with Cessna 180s, didn't you? A. Yes.

Q. And in your experience is it possible to remove any of the seats from that airplane and still fly it? [117]

A. You can remove 3 of the seats.

Q. You can remove both the back seats and one of the front seats?

A. As long as you leave the pilot seat there, that's all that is necessary for the flight.

(Testimony of Albert N. Lindemuth.)

Q. And it's possible to remove the dual controls from the airplane, too, isn't it? A. Yes, sir.

Q. So there's only one set of controls instead of two, and the one seat being for the use of the pilot, of course? A. That is correct.

Q. Do you know from your experience what the reduction in weight of that airplane would have been if the two rear seats and the one front seat had been removed as well as the dual controls?

A. I'll have to make a guess, and that would be 50 pounds I believe would be reasonable.

Q. 50 pounds. Now, Mr. Lindemuth, would you take the 50 pounds that would have resulted from making that change on the plane, what could have been the overload based on Mr. Talbot's assumption? A. 334.

Q. Based entirely on Mr. Talbot's assumption, there was—there were 22—did you say 22 gallons of gasoline aboard? A. 222 pounds. [118]

Q. 222 pounds aboard, and the 16 cases of dynamite—the overload then would have been 334 pounds, is that right? A. Yes.

Q. Now, suppose the pilot weighed 150 pounds instead of 170 pounds—that would be, in figuring the actual weight in the airplane and on this assumption, a reduction of another 20 pounds, isn't it? A. Yes, sir.

Q. And would you apply that reduction? (The witness so complied.) Now, based entirely on the assumption again, that would have left an overload of approximately 314 pounds? A. Yes.

(Testimony of Albert N. Lindemuth.)

Q. Now, Mr. Lindemuth, you have been flying around Alaska for a good many years, haven't you?

A. Yes.

Q. And a good many hours in Cessna 180s, haven't you? A. Approximately 300.

Q. And you have flown a lot of time over—around Lake Iliamna and Bristol Bay area, haven't you? A. Yes, I have.

Q. Now, do you know where Big Mountain is?

A. Yes, sir, I have been at Big Mountain.

Q. Do you know where the Iliamna Bay strip is?

A. I don't know exactly where that is.

Q. Do you know that it's located approximately opposite Iliamna [119] Bay on the Cook Inlet side but inland a short distance, don't you? You know approximately where it is, don't you?

A. I know where it is, but I just don't know which one of those strips down there is called Iliamna Bay strip. I have been all over.

Q. If you, as a pilot, were ferrying back and forth between Big Mountain and Iliamna Bay strip, do you know approximately the distance between those two points? A. Yes.

Q. What is it, sir?

A. I would say not to exceed 30 miles.

Q. And if you were hauling loads on charter flights, it certainly wouldn't be a requirement or prudent requirement, necessarily, to carry full tanks at all times, would it?

A. No, sir, it wouldn't.

(Testimony of Albert N. Lindemuth.)

Q. As a matter of fact, you bush pilots cut down your gas load whenever you can if you're hauling to the limit in order to give you extra payload, as you call it, don't you? A. Correct.

Q. Now, how much gas would a Cessna 180 burn in traveling the 30 miles between Iliamna Bay and Big Mountain?

Mr. Talbot: Object, your Honor. It isn't shown whether the plane is empty or light.

The Court: Overruled. You didn't show that yourself on your own computation. [120]

A. The gasoline consumption would be, I should judge, 5 gallons in that 30 miles.

Q. 5 gallons in 30 miles. Then would it be possible approximately to make a round trip between the two points on about 10 gallons of gasoline? A. Well, yes.

Q. That wouldn't leave you any leeway, would it though, if you were going to make the round trip?

A. No.

Q. And you would ordinarily carry a leeway of gasoline, wouldn't you?

A. In a case like that, why you would probably carry half again as much as you need, at least.

Q. Yes. And so if you were cutting down to get the maximum load, as the bush pilot would express it, you would at least have to carry about 15 gallons, wouldn't you, to make that round trip?

A. Yes.

Q. Now, what would 15 gallons at 6 pounds per gallon weigh—90 pounds? A. 90 pounds.

(Testimony of Albert N. Lindemuth.)

Q. Now, can you apply a correction to your figures to show what that airplane would have weighed with all that dynamite aboard, assuming that it's aboard, if the Pilot Haley had had only 15 gallons on board when he started out that [121] morning? Now, that will mean taking your 55 gallon computation times 6 and changing it to 90 and applying it to those figures in whatever manner is clear to you.

Mr. Talbot: Your Honor, I object to that as contrary to the evidence which is that the pilot put at least 35 gallons in the tank the night before.

The Court: Well, I don't know. Now this witness is an expert. He's being called upon to testify to something he doesn't know anything about except from his own experience, and he testified that the gas would weigh 222 pounds. Now, I think it's proper to ask him what it would weigh if you want to use lesser amount of gas.

Mr. Talbot: Very well.

The Court: I don't know what the evidence is going to be. Maybe they're going to show he only had 15 gallons in the plane.

A. If my figures are correct, it's 1,007.

Q. 1,007?

A. I used 19 pounds for oil, 150 for the pilot, 90 for the gas, 848 for the dynamite.

Q. That would be 1,007 inside the airplane. Now, I suppose you could subtract 1,007 from 1,259—is that how you would arrive at—in order to apply

(Testimony of Albert N. Lindemuth.)

the correction in gasoline or the hypothesis I am making, to the 314 pounds overload? [122]

A. We can do that another way. We used 37 gallons in Mr. Talbot's computations and we arrived at 222 pounds, so we are now using 15 gallons in your computation, or 90 pounds.

Q. You subtract 90 from 222?

A. And we get 132 pounds.

Q. And you would subtract 132 from 314, wouldn't you? A. 182.

Q. That would be 182 pounds, Mr. Lindemuth?

A. Yes.

Mr. Nesbett: I believe that is all, thank you.

ALBERT N. LINDEMUTH

testifies as follows on

Redirect Examination

By Mr. Talbot:

Q. Mr. Lindemuth, while you are still there, I believe in response to one of Mr. Nesbett's questions about items possibly having been removed from this plane, namely, the dual controls, the front seat, one of the front seats and the back seats —are those the items that Mr. Nesbett mentioned to you? A. Yes.

Q. And you made, as you said, a guess that that would reduce the empty weight of the aircraft by about 50 pounds? A. Yes, sir. [123]

Q. Now suppose, Mr. Lindemuth, that the front seat next to the pilot was taken out, all right, but

(Testimony of Albert N. Lindemuth.)

that it was replaced by a Fairbanks Aircraft Hammock Seat, Kit Model AS-1. Would that change your estimate of the amount of weight which was saved by these alterations?

A. It would be very doubtful, Mr. Talbot, if that seat and that installation was in the aircraft. All that seat consists of is two rods like this, with a bracket and when you carry freight you take them out and put them——

Q. And you think it's possible that they were not in the aircraft?

A. They probably weren't in.

Q. Are those back seat—is that a replacement for the back seat or front? A. Back.

Q. Suppose it was in the aircraft, though, about how much would it weigh?

A. Probably 10 pounds.

Mr. Talbot: I have no further questions.

ALBERT N. LINDEMUTH

testifies as follows on

Recross-Examination

By Mr. Nesbett:

Q. Were you in the Iliamna area in December of 1955, Mr. Lindemuth? [124] A. No, sir.

Q. Did you have occasion to visit the scene of the crash of the 180 in that area? A. No, sir.

Q. You have flown a Cessna 180 commercially, haven't you? A. Yes.

(Testimony of Albert N. Lindemuth.)

Q. Have you ever flown one with 182 pounds overload, to your recollection?

A. Fifth Amendment.

Q. Have you ever flown one with a 300 pound overload? A. Same answer.

Mr. Nesbett: No further questions.

The Court: May this witness be excused?

Mr. Talbot: Yes, your Honor.

(Thereupon, the witness retired from the stand.)

The Court: May I inquire of counsel how many more witnesses do you have?

Mr. Talbot: Excuse me, your Honor, just one moment. (Short pause.) One, maybe two, your Honor.

The Court: Well, we are going to have to have a discussion on some instructions.

Mr. Talbot: Yes, sir.

The Court: So ordinarily we discuss the instructions prior to the argument to the jury, so I don't suppose that you can complete your testimony by tomorrow noon, can you?

Mr. Nesbett: I have no idea who his witnesses are, [125] your Honor. My case depends largely on what proof I have to refute.

The Court: Well, we'll try to have some discussion as to the instructions either tomorrow morning or during the noon hour so this case can be argued to the jury in the afternoon.

Ladies and gentlemen of the jury, we are about

(Testimony of Albert N. Lindemuth.)

to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone; you are not to allow anyone to discuss it with you. You are not to discuss the rights of the principal or parties until the rights of the parties are finally submitted to you for your decision. Now, this means when you go home tonight you are not to discuss this case with your family or you are not to discuss it with your neighbors, and above all, you are not to seek out some bush pilot and talk to him about how this plane should be run. You are to keep an open and free mind until this case has been submitted to you, and after you get through with this case you can discuss the case all you want to. You can criticize the Court, the attorneys or witnesses—I don't care. But until this case has been finally submitted to you for your decision you must not discuss it with anyone. And you must not, under any circumstances, express or formulate any opinion as to whether the Plaintiff should or should not recover. With that admonition, we will now recess until 10 o'clock tomorrow morning. [126]

(Thereupon, at 4:30 o'clock p.m., June 2, 1958, this case was continued to the next morning at 10:00 o'clock a.m., June 3, 1958.) [127]

The Court: Is it stipulated the jury is present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: You may proceed.

Mr. Talbot: Your Honor, a preliminary matter: last evening the defense subpoenaed a witness named John Poppas. We later determined, however, that Mr. Poppas had no personal knowledge of matters in this case and Mr. Nesbett has stipulated with me that Mr. Poppas may be excused although he was subpoenaed if that is agreeable with the Court.

The Court: Well, Mr. Poppas is the one that signed that letter and you may have to have him here for foundation if you want to get the letter in.

Mr. Talbot: We are not going to offer the letter, either, your Honor.

The Court: Oh, aren't you? All right, he may be excused.

Mr. Talbot: Thank you. That is Defendant's Exhibit C for identification; we would like that to be considered as withdrawn.

The Court: It may be withdrawn.

Mr. Talbot: Your Honor, I noticed last evening two mistakes, [129] typographical errors in documents that we have submitted to your Honor, and I'd like to call the Court's attention to them. On page 2 of our proposed jury instructions there is a citation to 14 CFR 59.0. That is an error.

Mr. Nesbett: 59—?

Mr. Talbot: 59.0.

The Court: Which page is that?

Mr. Talbot: Page 2 of our proposed jury instructions, the bottom citations.

The Court: You know up here you don't use numbered pages—I mean numbered lines, and it's

very difficult to find them, sometimes. All right. What else is there?

Mr. Talbot: That should be 49.0 instead of 59.0.

The Court: All right.

Mr. Talbot: The other inaccuracy is in our trial memorandum in quoting from the Bruce case. The last word in the quotation is "court" and it should have been "tort," t-o-r-t, and the quotation doesn't make much sense the way we had it written, your Honor.

The Court: Well, I noticed that and I just presumed it was a secretarial error.

Mr. Talbot: Your Honor, I would like the court at this time to take judicial notice of certain Federal regulations which I referred to in our trial memorandum and the jury instructions. I thought perhaps for the record that I [130] could read a list of those and ask your Honor to take judicial notice of them.

The Court: I don't think there's any question, is there, Mr. Nesbett?

Mr. Nesbett: No, I don't believe so.

The Court: All right, you read them; I'll take judicial notice.

Mr. Talbot: Following regulations, 14 Code of Federal Regulations, Sections 49.0, 49.81, 49.71, and in Volume 49 of the Code of Federal Regulations, 72.5 and 73.6. Strike that last, please—73.86. Also in the Volume 14 Code of Federal Regulations, Section 49.3 b. Your Honor, our position in the case is that the interpretations of these regulations is prop-

erly a matter for the court and we will ask the court to instruct the jury concerning the legal effect of these regulations. Otherwise I would feel obliged to read those regulations to the jury if it's a matter for the jury to pass on.

The Court: Well, I don't know. I want to discuss with your your instructions and if they are covered in your instructions it may be a different thing, because I don't propose to take those regulations and tell the jury what they mean. I don't know what they mean. Now, have you covered them in your instructions?

Mr. Talbot: We have not quoted from a single one of them in the instructions. We have based the instructions [131] upon what we contend is the clear meaning of the regulations.

The Court: Well, I have read your instructions and I don't think it will be necessary to read the —may I do this: postpone the reading of the regulations until after we have discussed the instructions and if you feel the regulations should be read to the jury I will allow you to read the regulations.

Mr. Talbot: Yes, your Honor. Your Honor, Mr. Nesbett and I have stipulated that Pilot Haley kept his log in Greenwich Civil Time, and that where the figures 1900 hours appear in the log for—well, in the log or flight reports—that 1900 hours means 9:00 o'clock a.m. Big Mountain time. And similarly that where the figures 2000 hours appear in these documents that mean 10:00 o'clock a.m. Big Mountain time.

Mr. Nesbett: That is correct, your Honor.

Mr. Talbot: Your Honor, I call upon Mr. Nesbett to produce Pilot Haley's flight report for December 17, 1955. I offer in evidence as Defendants Exhibit L.

The Court: No objection. It may be received.

Mr. Nesbett: I object, your Honor.

The Court: Well, if you're going to object you better make your objection audible. I can't read your mind.

Mr. Nesbett: I thought your Honor would be looking at it and I'm sorry, your Honor. I object on the same ground, that flight reports for other days prior to the flight were [132] rejected by your Honor earlier in the trial. It has nothing to do with the loading of the airplane on the day in question. That's the only issue here that the jury will pass on. There's nothing else to my knowledge in that flight report that would be of any assistance to the court or the jury. Your Honor admitted yesterday a document, that that was the flight log of the airplane on the 17th on the ground that it might indicate the amount of gas aboard. This flight report indicates aboslutely nothing as far as the airplane is concerned except the hours flown. It's a report that was submitted to Morrison-Knudsen simply for payment on an hourly basis.

The Court: What is the purpose of the exhibit?

Mr. Talbot: Your Honor, this exhibit corroborates the log for one thing.

The Court: Well, there's no dispute as to the log. It doesn't need any corroboration.

Mr. Talbot: It will corroborate in several respects the testimony of the witness who has not yet been heard. I think perhaps, your Honor, I should offer it again later.

The Court: Well, I'll have this marked for identification only, and if it becomes material, why I will allow it to be introduced in evidence, but unless you can connect it up in some way, why I will sustain the objection.

Mr. Talbot: I will call upon Mr. Nesbett [133] to produce the flight report for December 18, 1955, or any portion thereof in the possession of the plaintiff.

Mr. Nesbett: We have, your Honor, what may or may not be the document that Mr. Talbot requests or a portion of the document. I might say, your Honor, that Cordova Airlines does not submit it and vouch for it as having been the authenticated flight report for that day.

Mr. Talbot: Your Honor, I would reoffer at this time Defendants Exhibit L for identification which is the flight report which Mr. Nesbett produced for the previous day in order that your Honor may compare and see the similarity in the handwriting, format, printing, etc. of these two documents.

The Court: Well, we haven't got the other document in yet. There's no necessity for introducing for the comparison until the second document gets in.

Mr. Talbot: I offer what appears to be the flight report for December 18, 1955.

Mr. Nesbett: We object to the admission, your Honor, on the ground that as is apparent from the exhibit itself it's badly mutilated, torn and possibly burned, and we have no knowledge ourselves of the authenticity of it.

The Court: May I inquire was the flight log destroyed or burned in the crash? Was it kept ordinarily in the airplane?

Mr. Talbot: I think Mr. Nesbett can answer that [134] better than I can, your Honor.

Mr. Nesbett: Was that kept in the airplane, your Honor?

The Court: Yes.

Mr. Nesbett: Those flight reports were something that was made out by the pilot to submit to the contractor for the airline to get payment for the hours of flying done. If they weren't required to be kept in the airplane undoubtedly on occasions they were in the airplane.

The Court: I think, counsel, you have got to lay a foundation. All you have done is produce the document. Now you have got to lay some foundation where the document came from and where it was discovered and just producing the document and offering it to be received I don't think is sufficient. You have got to lay some sort of a foundation.

Mr. Talbot: Very well, your Honor, of course——

The Court: It may be marked for identification

and if you can lay a foundation I will probably allow it to be received.

Mr. Talbot: Very well, sir.

Mr. Nesbett: That would be Exhibit M?

Deputy Clerk: Right.

Mr. Talbot: I'd like to call Mr. Smith again for a couple of questions. [135]

MERLE K. SMITH

resumes the witness stand, and having previously been sworn testifies as follows on

Cross-Examination

By Mr. Talbot:

Q. Mr. Smith, you are the same Mr. Smith who testified previously? A. I am.

Q. And you are the president of Cordova Airlines? A. I am.

Q. I direct your attention, Mr. Smith, to the flight on December 18, 1955, in which your company's aircraft Cessna 1569 "Charley" was destroyed. With reference to that flight, Mr. Smith, did Cordova Airlines secure written permission from Farwest General Agency of the Exchange Building, Seattle, Washington, as agent for the insurance companies to make that flight?

A. We did not. It wasn't required.

Q. Now with reference to that same flight on December 18, it is true, is it not, that the aircraft was engaged in carrying explosives?

A. I so learned, yes.

(Testimony of Merle K. Smith.)

Q. Now, Mr. Smith, in connection with that same flight did Cordova Airlines receive any certificate from the shipper of those explosives that that shipment of explosives complied with applicable Civil Aeronautic [136] Board regulations having to do with the carriage of explosives by air?

A. I don't really now. If there was a certificate, why Morrison-Knudsen would have had it. It might have been in the airplane and destroyed; I don't know.

Q. Have you made any effort to ascertain whether or not Cordova Airlines received this certificate required by law?

A. No, I haven't.

Mr. Talbot: No further questions.

MERLE K. SMITH

testifies as follows on

Redirect Examination

By Mr. Nesbett:

Q. You say you haven't made any effort to ascertain if such a certificate was received by Pilot Haley?

A. The only way it could have been received would have been by Pilot Haley and I presumed that Morrison-Knudsen took care of it.

Q. You have learned, of course, that the dynamite Pilot Haley was carrying was located at Iliamna Bay airstrip, have you not? A. Yes.

(Testimony of Merle K. Smith.)

Q. Has this map been introduced in evidence?

The Court: We have a map that was [137] admitted.

Deputy Clerk: Exhibit E.

Q. (By Mr. Nesbett): Mr. Smith, I hand you the Defendants Exhibit E which is a map of the Iliamna area of Alaska. Can you raise that map so that the jury can see you point, and will you, on that map, point and circumscribe with your forefinger the area occupied by Lake Iliamna?

A. This area, this spot in there. (Indicating.)

Q. Now will you roughly trace along the line of the Alaska Peninsula at the shore of Cook Inlet for the jury?

A. This right here, this is Cook Inlet.

Q. Now, Mr. Smith, where, with relation to Lake Iliamna and Cook Inlet, was Iliamna Bay airstrip included?

A. That little red mark right there, I believe is Iliamna Bay.

Q. Now, would that be the point of land between one edge of Lake Iliamna and Cook Inlet?

A. Yes.

Q. And is that where the dynamite was picked up by Pilot Haley?

A. At Iliamna Bay strip.

Q. Yes. Now, isn't it a fact that the map so indicates that that strip is located in, several miles inland from Cook Inlet with a road indicated on the map [138] connecting the strip with Cook Inlet?

(Testimony of Merle K. Smith.)

A. Yes; the road from the Cook Inlet side to there, that's right.

Q. Now, did Cordova Airlines have anything to do with getting the dynamite to Iliamna Bay airstrip? A. We did not.

Q. Do you know what agency caused the dynamite to be transported to the airstrip where Pilot Haley picked it up?

A. I presume that Morrison-Knudsen hauled it over there and probably went down to the Cook Inlet side of Iliamna by barge.

Mr. Talbot: I object, your Honor, to what the witness presumes.

The Court: It may go out. The witness can't testify as to what he presumes.

Q. Well, in any event, your airline had nothing to do with getting the dynamite to the strip, is that correct? A. That's right.

Q. Now, can you raise that map, Mr. Smith, for the jury and trace roughly the flying route that a pilot would or might fly to carry the dynamite from the Iliamna Bay airstrip to Big Mountain?

Mr. Talbot: Object, your Honor. No proper foundation. The pilot could fly any route, [139] presumably.

Mr. Nesbett: I said could or might.

The Court: Well, you know this is not proper cross-examination. There was nothing—counsel for the Defendant didn't ask any questions at all relative to this thing. This is a new subject entirely. If you want to call this witness as your witness at

(Testimony of Merle K. Smith.)

the proper time it will be all right but I think you are limited now to the cross-examination as to the subject opened by the Defendant.

Mr. Nesbett: Your Honor, the only reason for this, I was going to mention in the next question or two was to indicate where a certificate such as he inquired about would have been received and who would have had it. In other words, that the dynamite got to Iliamna Bay through agencies unknown to Cordova.

The Court: Then what difference does it make whether he flew through the valleys or over the mountains or north or west?

Mr. Nesbett: Nothing. I said roughly the route. I will withdraw that question.

Q. (By Mr. Nesbett): Mr. Smith, will you point again to Big Mountain on the map? (The witness so complied.) Now, Mr. Smith, do you know whether or not Pilot Haley got a certificate from Morrison-Knudsen or any other agency at Iliamna Bay when that dynamite was loaded aboard your airplane? [140] A. I don't know.

Q. Would you have any way of knowing if the certificate had been received and was on the airplane at the time of the crash?

A. I wouldn't. I don't know how I would know.

Q. When did you learn of this defense of failure to receive such a certificate?

A. I don't—just exactly when I did first——

Q. You learned it first at the time the motion

to amend the Complaint was filed just at the commencement of the trial, didn't you?

A. Yes. Well, yes.

Mr. Nesbett: That's all.

Mr. Talbot: No cross.

The Court: Step down.

(Thereupon, the witness was excused and retired from the stand.)

Mr. Talbot: Your Honor, I would like next to read into evidence a portion of the deposition of Mr. Smith which was taken.

The Court: Of Mr. Smith?

Mr. Talbot: Yes, your Honor.

The Court: Well, now, I don't know whether you have a right to read the deposition of a witness who is in court. You can use a deposition as an impeachment purpose. [141]

Mr. Talbot: Your Honor, on May 24, 1958, we took the deposition of Cordova Airlines, Inc., by Merle K. Smith, its president. And I offer these—this portion of the deposition, not as impeachment but as party admissions and I have checked the point and I am satisfied that I'm entitled to do that. In fact, I have done it before.

Mr. Nesbett: Well, the fact that he's done it before has——

The Court: Well, now, do you object or don't you?

Mr. Nesbett: Yes.

The Court: Sustained. You have a witness here. You can ask him exactly the same questions from

the witness stand and if he doesn't answer them the same way you can impeach him but my understanding is that you cannot use the deposition of a witness in court if there is any objection.

Mr. Talbot: Might I have leave to furnish your Honor some authority on that point and defend this——

The Court: Yes; if you have any authority, I'll be glad to read it. What is it?

Mr. Talbot: Very well. I shan't bother with it at this time but I will at the first opportunity.

The Court: All right. May I clarify something? Can it be stipulated that this flight was known as Flight MK?

Mr. Nesbett: Flight MK, your Honor?

The Court: Flight No. MK. [142]

Mr. Nesbett: No, your Honor; never heard of any such designation.

The Court: Well, this is aircraft 1569-C?

Mr. Nesbett: That is the aircraft in question, yes, sir.

The Court: But you don't know anything about a flight No. MK?

Mr. Nesbett: Where does your Honor see that—on what?

The Court: Well, I see on this flight report.

Mr. Nesbett: Are you looking at the flight report that was offered in your Honor's——

The Court: I am looking at flight report 17.

Mr. Nesbett: On the 17th?

The Court: Yes, December 17.

Mr. Nesbett: Oh, well, apparently the pilot just

indicated the flight number instead of having number. It was charter work for MK and he apparently put it in there.

The Court: Well, let's have the flight reports that were refused admission yesterday. I think they were marked for identification, weren't they?

Mr. Nesbett: Yes, your Honor.

The Court: Do you still have them here?

Deputy Clerk: K and——

Mr. Talbot: Exhibit H, your Honor. [143]

Deputy Clerk: Oh, H.

The Court: Now I notice on these, on Exhibit H which is the flight reports for November 19, 20, 29, and December 5—it's flight number MK. Now I refused to allow these to be received in evidence upon the ground that it didn't make any difference as to the information contained because it didn't have any bearing upon the day in question, but now it has some bearing upon the flight number. Now I want either a stipulation that this was flight MK or I am going to allow the Defendant to prove it is MK by the introduction of these other flight reports.

Mr. Nesbett: Well, your Honor, apparently all of them are marked "Flight MK," so we will stipulate that as far as the flight number it was MK.

The Court: Then I noticed—the reason I am asking that, I notice that on Exhibit M which objection has been made to is also Flight No. MK, and Craft No. 1569-C. I am just calling that to your attention because it certainly does connect up the Exhibit M with the Flight No. MK, which was the

flight of the airplane being used in this particular activity.

Mr. Nesbett: Your Honor, we are certainly not trying to obstruct the production of facts in the trial. We know that that exhibit that we have objected to does have a heading that indicates that it was at one time a full sheet of flight reports or of a full sheet of flight reports used by [144] Cordova Airlines. It looks to be that from that patch-up certificate, and some of the words are legible, like "Flight Number MK." Some of it is not legible. We can't vouch for it as being the flight report for that day, although it appears to be made on the flight report paper.

The Court: All right. If the Defendant can lay the proper foundation, why I'll probably allow it to be introduced in evidence.

Mr. Talbot: Your Honor, I have located our authority for the admissibility of this portion of Mr. Smith's deposition. Rule 26 (d) (1) and (2).

The Court: Federal Rules?

Mr. Talbot: Yes, your Honor.

The Court: Let's see. All right. Rule 26 (d) (1)?

Mr. Talbot: (d) as in dog (1).

The Court: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as witness." That is proper. "(2): The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an ad-

verse party for any purpose." All right. Where is your authority for that? Where's your cases? I'm not interested in the rule, I'm interested in what the court says the rule means. [145]

Mr. Talbot: Very well. We'll have to find them for your Honor.

The Court: If you can find the cases I'll change my ruling, but——

Mr. Talbot: Call Mr. Evans.

EDWIN E. EVANS

called as a witness on behalf of the Defendants and being first duly sworn upon oath testifies as follows on:

Direct Examination

By Mr. Talbot:

Q. Mr. Evans, would you please state your full name, sir? A. Edwin E. Evans.

Q. And you might get a little closer to that microphone. It works pretty well. Where do you live, Mr. Evans?

A. 836 Seventh Avenue, Anchorage.

Q. And by whom are you employed at the present time? A. Federal Electric Company.

Q. Tell me, were you employed by Morrison-Knudsen Company in December of 1955?

A. I was, sir.

Q. What was your position with Morrison-Knudsen at that time?

A. I was site superintendent.

Q. And what site?

(Testimony of Edwin E. Evans.)

A. Big Mountain, Alaska. [146]

Q. About when did you go to Big Mountain to be the site superintendent?

A. First of December.

Q. Of what year? A. 1955.

Q. Mr. Evans, what kind of a site was this? What were you building over there?

A. We were building a communication site for White Alice, known as the White Alice sites.

Q. It was not a radar site? A. Right.

Q. It had to do with some high frequency radio communication? A. It is.

Q. And that was under contract that Morrison-Knudsen, Western Electric had with the United States Air Force, was it not?

A. That's right.

Q. Did you ever meet a man named Herbert Haley? A. I did.

Q. When and where did you meet him?

A. I met him at the Iliamna air strip. That was the one between Iliamna Bay and the Iliamna Lake on the day I was in transit to the job.

Q. Now in your work at Big Mountain, did you have any aircraft available to you? [147]

A. We—the Cessna plane that Herb Haley was flying was the only one we had available on the site.

Q. That was this Cordova Airlines plane we're talking about? A. That's right.

Q. Was this Cordova Cessna already on charter

(Testimony of Edwin E. Evans.)

to Big Mountain when you took over as superintendent, or was it chartered later?

A. It was previous to my arriving there.

Q. Haley was already operating there?

A. That's right.

Q. What sort of work did Haley and his plane do for you?

A. It was chartered to do the—well, you might say run the lifeline for the camp, that it was to carry our passengers back and forth from Iliamna, the town of Iliamna, to carry any freight back and forth from Iliamna, and the mail and anything requested by the supervision on the site.

Q. You had an airstrip at Big Mountain, then?

A. That's right. Under construction at the time; it wasn't completed.

Q. When was it completed?

A. It was completed shortly after that so that larger planes could get in. It was suitable for small planes at the time of the accident.

Q. I see. Now, for how long were you superintendent there [148] at Big Mountain?

A. Until the 10th day of January, I believe it was, 1956.

Q. Mr. Evans, what other planes if any used the strip at Big Mountain while you were superintendent there?

A. I believe it was the Arctic Cargo used it to transport fuel oil to us and the Safeway Airways was in one trip with a small plane and the CAA

(Testimony of Edwin E. Evans.)

group of people used it the day they came in to inspect the crash.

Q. During the time you were there did any United States Air Force planes ever use that strip?

A. Not to my knowledge.

Q. Now, this Arctic Air Cargo plane—was that a private plane or Air Force plane?

A. That was I believe a private plane, privately owned company.

Q. When was the last time you saw Herb Haley?

A. The morning of the 18th day of December, 1955.

Q. Was he dead or alive?

A. He was alive.

Q. And did you see him dead afterwards?

A. Yes, sir.

Q. He died in this crash, did he not?

A. Right.

Q. Now, you were superintendent at Big Mountain. Who was the responsible official of Morrison-Knudsen Company who [149] customarily gave requests or directions to Pilot Haley as to what work he would perform? A. I was.

Q. Did you ever have occasion to ask Pilot Haley to move any dynamite for you?

A. Yes, which I did, I believe, on the evening of the 16th day of December. I asked Mr. Haley if he could and would haul the powder.

Q. By powder you mean dynamite?

A. That's right.

Q. That comes in sticks, does it not?

(Testimony of Edwin E. Evans.)

A. It does.

Q. What did you need the powder for, Mr. Evans?

A. In building a road to the site from lower base camp on the lake.

Q. Had to blast some rock out of the way?

A. Yes, and frozen ground.

Q. I believe you personally are experienced in the use of powder? A. I am.

Q. What was used to build that airstrip, what kind of equipment?

A. The kind of equipment that we had at the time was some D-8 Caterpillar tractors, Woolridge scrapers, an 80-D shovel and some end dump Eucs, 10-ton end dump Eucs. **[150]**

Q. How did all that heavy equipment get to Big Mountain? Was it flown in?

A. No, it was barged, as I understand it. It was prior to my time at the site. I understand it was barged to Iliamna Bay, transported overland over Portage Road to Pile Bay, loaded on barge at Pile Bay and taken to Iliamna to Big Mountain base camp.

Q. I believe you said it was on December 16 that you first asked Pilot Haley to move some dynamite for you? A. That is right, sir.

Q. Can you tell us when, on what date Pilot Haley actually moved the first dynamite for you?

A. On the day of 17th day of December, 1955.

Q. Did you direct Pilot Haley to move the dynamite or request him to do it?

(Testimony of Edwin E. Evans.)

A. I requested him.

Q. Did you tell Pilot Haley how much dynamite to carry? A. I did not.

Q. Did you give Pilot Haley any written certificate that the shipment of explosives which he was to carry complied with regulations of the Civil Aeronautics Board with respect to the transportation of explosives? A. I did not.

Q. Do you know whether or not anyone else at Morrison-Knudsen gave such a certificate to Pilot Haley? [151] A. I do not.

The Court: That is you do not know?

A. I do not know, sir.

Q. Then Pilot Haley made his first trip carrying dynamite on December 17th?

A. To my—to the best of my knowledge that was it, yes, if I remember right.

Q. Do you know how much dynamite he carried on the first trip on the 17th? A. Yes——

Mr. Nesbett: I object, your Honor, as having been clearly irrelevant. He doesn't know it was the 17th for certain, and——

The Court: Overruled. The question is did he know and he says yes. But I will sustain the objection as to the amount.

Mr. Talbot: Your Honor, may I suggest the relevancy of this?

The Court: Not necessarily. You know this is somewhat akin to an automobile accident. You can't prove negligence by proving that the driver has been negligent before, the day before or even the

(Testimony of Edwin E. Evans.)

minute before. You have got to prove negligence at the time of the accident.

Mr. Talbot: That's not my point at all.

The Court: If there is an overload here you can't [152] prove that by showing on the 17th that there was an overload.

Mr. Talbot: Absolutely cannot.

The Court: What was your purpose, then?

Mr. Talbot: Two purposes. One, to show that there was space in the plane that could accommodate 16 cases of this dynamite, and, secondly, it has a good bearing on the question of gasoline consumption, to show that on the two flights on the 17th he was similarly loaded and followed a similar route. Now we do have some information about how much gas he burned on two trips on the 17th and I propose to divide that in half for the one trip on the 18th. That's the only purpose for this, your Honor.

The Court: Well, for that limited purpose I will overrule the objection.

Q. (By Mr. Talbot): Do you know how much dynamite was carried on Haley's first flight on the 17th? A. Yes, sir.

Q. I believe your answer was yes?

A. Yes.

Q. How much did he carry?

A. 16 boxes—16 cartons.

Q. How do you know he carried 16 cartons?

A. Because I helped him unload—showed him where to store it. [153]

Q. Did you actually participate in the unloading

(Testimony of Edwin E. Evans.)

of that first load? A. I did.

Q. Carried some of the boxes yourself?

A. I did.

Q. Now, did Pilot Haley make a second trip on December 17th carrying dynamite?

A. Yes, to my knowledge he did.

Q. How do you know that?

A. Well, because later on the powder was in the —I did not see him unload the power but the powder was in the magazine.

Q. At Big Mountain?

A. At the Big Mountain site.

The Court: The only way you could get over was by flying it?

A. That is right, sir, at that time of the year.

Q. Now, on the 18th of December, 1955, where were you when you first learned that Pilot Haley had crashed?

A. I had just arrived back at the base camp, in the office.

Q. And who advised you that there had been a crash?

A. One of the crewmen, an oiler, heavy equipment and oiler, rather.

Q. What did you do when you were advised there was a crash?

A. I picked up my office clerk and my assistant office clerk [154] and my first aid man and we rushed in some fire extinguishers and rushed to the plane.

(Testimony of Edwin E. Evans.)

Q. What did you find generally when you got to the plane?

A. Well, it was pretty badly mangled up and still burning.

Q. The plane itself was still burning?

A. Well, the gas tank on one side of the plane was still smoldering and smoking, yes.

Q. Where was Pilot Haley?

A. His body was laying just a few feet off to the front and left of the wreckage, from the crash end.

Q. Was he dead? A. Yes, he was.

Q. Did you take any pictures of that scene yourself, Mr. Evans? A. I did not.

Q. I hand you a couple of photographic prints, Mr. Evans, and ask you if you have ever seen those before? A. Yes, I have.

Q. You gave those to me yesterday, did you not?

A. That is right.

Q. Where did you get them?

A. I got them from my first aid man, George Ammon, that I had requested to take the pictures at the time.

Q. Now, do you have in your mind a clear memory and recollection of that scene? [155]

A. I do.

Q. Can you tell us whether or not those photographs accurately represent the scene as you remember it? A. Very well.

Mr. Talbot: I believe I will offer those, your

(Testimony of Edwin E. Evans.)

Honor. I do offer them together as Defendants Exhibit N.

Mr. Nesbett: I will object, your Honor.

The Court: What grounds?

Mr. Nesbett: Were you there when those pictures were taken, Mr. Evans?

A. I was.

Mr. Nesbett: Did you see your first aid man take them?

A. I did.

Mr. Nesbett: And do you know that those are the pictures that he took at the time you directed him to take them?

A. Well, the only way I can say is that I do believe they are.

Mr. Nesbett: Did——

The Court: Well, would you say that that is a fair representation of the scene on the morning of the accident?

A. Yes, it is.

The Court: I think that is all that is necessary. Objection overruled. It may be received in evidence.

Mr. Talbot: May I have, your Honor, Defendants Exhibit D for Identification? [156]

Q. (By Mr. Talbot): Mr. Evans, I hand you an additional series of 9 photographs numbered 1 through 9 which has been marked as Defendants Exhibit D for Identification, and ask you to examine each one of those photographs and the caption underneath. Read the caption to yourself and then tell us whether or not those photographs ac-

(Testimony of Edwin E. Evans.)

curately represent the scene and whether or not the captions underneath are accurate—that is, whether or not what it says in the caption, whether that actually appears in the picture as you remember the scene.

A. Photo No. 1—would you like that I read you caption under the picture?

The Court: Read it to yourself and tell us whether or not that is the fair representation of the scene of the accident as you remember it.

A. It is, sir.

Mr. Talbot: Shall I offer these individually?

The Court: No; let him look at the entire group.

A. No. 2, yes, very much so. No. 3, yes. No. 4, yes; No. 5, yes; No. 6, yes, and No. 7, yes. No. 8, yes; No. 9, yes.

Mr. Talbot: I offer the group of photographs, your Honor, as Defendants Exhibit D.

Mr. Nesbett: Object again, your Honor, on the same ground and I'd like to ask the witness a question or two. [157]

The Court: You may ask the questions.

Q. (By Mr. Nesbett): Do you know who took those pictures? Do you know of your own knowledge who took the pictures?

A. That I do not.

Q. When did you first see them, Mr.——

A. I first seen that group of pictures—I believe it was the day before yesterday.

Q. In Mr. Talbot's office?

A. Yes, the day before that, rather, Saturday.

(Testimony of Edwin E. Evans.)

Mr. Nesbett: I submit, your Honor, that they are not admissible.

The Court: Well, I don't know how the Plaintiff can be harmed by the introduction of those pictures. I don't think that those pictures either prove or disprove any of the issues in this case. The testimony has been that the plane was destroyed. It crashed and was destroyed. Now it isn't a question of what happened to the plane after it hit the ground. The question is what caused it to hit the ground, whether or not it was being operated the way the policy provided it be operated, not what happened after the plane had struck the ground. I don't personally—I don't think it makes any difference one way or the other whether they be introduced or not introduced. I don't think they benefit the Defendant any; I don't think they harm the Plaintiff any. [158]

Mr. Nesbett: Well, it could be prejudicial, your Honor, on the horror of a plane carrying dynamite and crashing and an allegation that dynamite amounted to unlawful purpose of flight that—if they are irrelevant, why bother the jury with them?

The Court: Those pictures may establish the fact that the stipulation is that dynamite never exploded.

Mr. Nesbett: Well, that's true.

The Court: Objection is overruled. The pictures may be received in evidence.

Mr. Talbot: Thank you, your Honor.

The Court: Now I am allowing the pictures to

(Testimony of Edwin E. Evans.)

be introduced, but the writing under the bottom of the pictures, I don't know. Let me see the photographs, will you? (The photographs were handed to the Court.) Well, I'll order the clerk to take scissors and to cut off the notations on the bottom of the photographs. Otherwise the photographs can be received in evidence.

Mr. Talbot: If that could be done, at this time I want to question the witness some more about those photographs.

The Court: Well, while we are waiting for the clerk, I want to ask the witness a question. You went over there immediately after the accident, didn't you?

A. Just as soon as I could get back there, sir.

The Court: And did you say the plane was burning? [159]

A. Yes; one gas tank on one side was still smoldering.

The Court: Did you put out the fire?

A. There was nothing there to—that warranted to put out the fire. We didn't see we could do any good to anything, and we left the evidence as it was.

The Court: After the fire had burned down and the plane was cool, did you attempt to locate the dynamite?

A. No. the dynamite was scattered right over the area.

The Court: Well, there was so many boxes of dynamite. Was the dynamite in the boxes?

(Testimony of Edwin E. Evans.)

A. No. No, sir, the boxes had all separated and the dynamite was scattered over the area.

The Court: Did you count and see how many boxes there were?

A. I did.

The Court: How many boxes did you find?

A. 16 boxes, sir.

The Court: You found 16 boxes. The dynamite was out of the boxes?

A. That's right.

The Court: I suppose these boxes you found were dynamite boxes—they weren't cracker boxes or something like that?

A. That is right, sir. They were the containers that dynamite is usually transported in, with the original [160] markings of the manufacturer and the strength of the powder.

The Court: And what was the weight of these boxes? Any weight on them?

A. The weight of the boxes, 50 pounds net.

Deputy Clerk: It's all right to leave the photo number on?

The Court: Yes, you can leave the photo number on them and the notations may be marked for identification as Exhibit D-1, so they can be in the file at least.

Well, I notice it's 11:00 o'clock and while the clerk is getting the photographs ready I think we will take our morning recess. Ladies and gentlemen, we are about to take another recess. It's my duty to admonish you you are not to discuss this case

(Testimony of Edwin E. Evans.)

with anyone; you are not to allow anyone to discuss it with you. You are not to formulate the rights of the parties until this case is finally submitted to you. With that admonition the court will stand in recess until 15 minutes after 11:00.

(Whereupon, at 11:15 o'clock a.m., June 3, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated that the jury is [161] present in the box?

Mr. Nesbett: Yes.

Mr. Talbot: Yes, your Honor, we have under the old Code of Civil Procedure an obscure provision that I had a hard time finding last night, but it's Section 58-4-64 and it provides as follows: "Whenever a writing is shown to a witness it may be inspected by the adverse party, and if proved by the witness shall be read to the jury before his testimony is closed, or it shall not be read, except on recalling the witness."

Now, our position is that that is a procedural rule which was superseded by the Federal Rules and that the question of when exhibits are read to the jury or whether they are read is in the sound discretion of the court.

The Court: Well, if you want to read an exhibit to the jury I will allow you to read it any time you want to read it.

(Testimony of Edwin E. Evans.)

Mr. Talbot: Thank you.

The Court: If you want to read it at the time it's introduced, it's perfectly all right with me.

Mr. Talbot: Well, I didn't want to have to recall Mr. King on account of that one exhibit yesterday, and——

The Court: No.

Mr. Talbot: Very well.

Mr. Nesbett: Now, your Honor, on that point, just to speak for a moment, it would seem that the reason for the [162] rule is a good one. If the exhibit is read it may afford additional opportunity for counsel to examine the witness at the time he is there. In other words, to——

The Court: Not necessarily; if the exhibit is in evidence the jury has a right to look at the exhibit. They can read it for themselves.

Mr. Nesbett: That is true.

The Court: And what difference does it make if counsel wants to read it?

Mr. Nesbett: Well, the only difference being that it might suggest to methods of examining the witness at the time he's there with the document that he is identifying.

The Court: Well, now, let's pass this up and when the time comes I will rule on it. There's nothing before the court.

Mr. Talbot: May I have the photographs, Defendants Exhibit D? (The exhibit was handed to counsel.)

Q. (By Mr. Talbot): I hand you Photograph

(Testimony of Edwin E. Evans.)

No. 1, Mr. Evans, and point out to you on the foreground certain depressions in the ground in the foreground of that picture and would you please show the picture to the jury? Hold it up.

The Court: Well, now ask the question.

Mr. Talbot: Very well, your Honor.

Q. Do you know what caused those depressions in the foreground [163] of the picture there?

The Court: Just a minute—I'll sustain an objection because he wasn't there and he said that was a fair representation of the scene of the accident. I didn't allow him the pictures to minutely describe anything. The pictures are before the jury and the jury can draw their own conclusions. Purely a conclusion of this witness as to what caused those depressions.

Mr. Talbot: Very well, your Honor.

The Court: There was a crash. That's all there is to it. There was a crash and whatever happened after the crash is entirely immaterial.

Q. (By Mr. Talbot): I hand you Photograph No. 2, Mr. Evans, and ask you if that photograph shows any of these dynamite boxes that you have testified to in answer to the court's questions.

A. Yes, I'll say that it does——

Q. I hand you Photograph No. 3 and point out to you a box which is in the foreground of that picture. Can you——

Mr. Nesbett: I'll object to the question on the same grounds your Honor stopped the witness before. He's pointing to the picture and says, "This is

(Testimony of Edwin E. Evans.)

a box," and is going on with a question. First he assumes it's a box. These are pictures that Mr. Evans had nothing to do with the taking of. He doesn't know who took them. [164]

Now he's using them in intricate, detailed fashion and practically to testify as though he took them himself.

The Court: Overruled.

Q. Mr. Evans, what appears to be a box in the foreground there, can you tell us what kind of a box that was?

A. Yes, sir; it's a cardboard carton that it was a dynamite container.

Q. Did you place that dynamite container there or was it found at the scene?

A. That dynamite box was laying exactly as it was after the crash.

Q. Mr. Evans, I hand you a box and ask you if the box which I have handed you resembles in any way boxes which you found at the scene of the crash? A. It does.

Q. Point out the similarities, if any, between the box you have before you and the ones you found at the scene?

A. The size, the quality of the box and the markings on the box.

The Court: These 16 boxes that you found that had markings, "Atlas Powder Company," did it?

A. Yes, sir, as I recall. I'm sure it was the Atlas Powder Company, as I remember, it was the Atlas Powder Company.

(Testimony of Edwin E. Evans.)

Q. Mr. Evans, I will ask you to look inside that box that you have before you and tell me what's in it? [165]

A. Well, there's some wax paper and small quantity of sawdust.

Q. Is there anything else in the box?

A. No, there isn't.

The Court: Was that the size box in which this powder was shipped?

A. That's right, sir.

Q. When you unloaded that first shipment of dynamite along with Pilot Haley, was that the type of box you unloaded? A. That's right, sir.

The Court: And it has marked on it, "50 pounds," is that right?

A. Yes.

Q. Now, Mr. Evans, have you had any familiarity yourself with the use of dynamite of this type?

A. Yes, I have. This is the first experience, let me explain to the court, that I have ever had any experience with cardboard carton. This powder that I handled when I handled powder, it all came in wooden containers.

Q. Now, of the cartons of dynamite which were delivered to the site at Big Mountain by Pilot Haley before he crashed, did you use some of that dynamite in your work?

A. Not previous to the accident.

Q. No, I mean subsequent to the accident?

A. Yes. [166]

Q. Did you observe how that dynamite was

(Testimony of Edwin E. Evans.)

packed? That is, what was in the box in addition to dynamite?

A. Wax paper and the sawdust that is usually in a container preserving the powder.

Q. Similar to what is in that box now?

A. That is right, sir.

Q. Mr. Evans, did you and I together weigh that box in the condition that it is now in?

A. We did.

Q. How did we do that?

A. We went to the post office and had the girl in the post office weigh it on the Government scale.

Q. That was the parcel post scale, the main branch of the post office here in Anchorage?

A. Right.

Q. In this building? A. Yes.

Q. What did it weigh?

A. 3 pounds and 5 ounces.

The Court: Well, we have a stipulation here that the dynamite weighed 50 pounds. The box says 50 pounds. Am I not right in assuming that the entire weight, the gross weight of the package was 50 pounds?

Mr. Talbot: No, your Honor. Our stipulation was 50 pounds net and that word was in the stipulation and it's in [167] my written account of our stipulation. I'm sure Mr. Nesbett will agree with me.

The Court: 50 pounds of dynamite plus the weight of the box?

(Testimony of Edwin E. Evans.)

Mr. Nesbett: That is true, your Honor.

The Court: All right.

Mr. Nesbett: I have also stipulated that this box is typical of the boxes that were carried by Pilot Haley over that period of time.

Mr. Talbot: I offer it as Defendants Exhibit O.

The Court: It may be received. And how much did you say the box weighed?

A. 3 pounds, 5 ounces, your Honor.

Q. (By Mr. Talbot): Mr. Evans, after the crash did you make an examination of the fusilage of this aircraft to see what, if anything, still remained inside?

A. Well, not too close of an observance, because I didn't want to molest the evidence in any way until it was inspected and we had permission to move the wreckage.

Q. What inspection did you make?

A. We walked around the plane and looked it over and could see what—more or less what the contents were inside from a distance, but there was absolutely nothing touched in any way to my knowledge, not by myself, anyhow, until [168] the CAA and the Commission had inspected the plane.

Q. Now, at the scene of the crash did you observe any personal effects or other articles such as the pilot may carry in the plane?

A. Yes; I did.

Q. Tell us what such items you remember seeing at the scene?

A. I remember seeing a few small cans of ra-

(Testimony of Edwin E. Evans.)

tions. I remember seeing a sleeping bag; I remember seeing a parka; I remember seeing a rifle; I remember seeing an axe, and I remember seeing a camera.

Q. Did you at that time and place have occasion to make an estimate of the weight of those items of personal effects, we'll call them?

A. Yes. As I recall, we were talking about the weights of the load which was not too much of an interest to me because I wasn't too familiar with what a plane was capable of hauling, but George Ammon, my first aid man, and myself felt that there was possibly 70 pounds of personal gear.

Q. Would you be certain, Mr. Evans, that there was at least, say, 35 pounds of personal gear?

A. Yes, I would say that, would be sure of that.

Q. That would be the safe side?

A. Yes.

Q. Where did Pilot Haley get his [169] gasoline?

A. That question as to where it was purchased, I couldn't say, but he did bring his gasoline in in 10-gallon carboys or two 5-gallon cans in wooden carboys and stored down in what we called the "Lagoon." That was a small ice strip down at the base camp and that is where the man serviced his plane whenever it was serviced.

Q. Then Pilot Haley maintained a stock of gasoline at the Lagoon? A. That is right.

Q. Did he use that stock of gasoline to put gas in his tanks before flight? A. That's right.

(Testimony of Edwin E. Evans.)

Mr. Talbot: You may examine, sir. Oh, I beg the court's pardon. There is one important item I overlooked. May I have Defendants Exhibit M for Identification? That's that fragment of the document. (The exhibit was handed to counsel.)

Q. Mr. Evans, I hand you Defendants Exhibit M for Identification, which is a fragment of a document called a flight report printed at the top and ask you to look at that closely, including the dates and figures that are inserted there and tell the court and jury whether or not you have ever seen that document before? A. Yes, I have.

Q. When did you first see that document?

A. Shortly after George Ammon, the first aid man, picked it up. [170]

Q. Where did George Ammon pick it up?

Q. Just outside of the wreckage of the plane.

Q. On what date, if you remember?

A. I couldn't be sure of that, whether it was the 18th or the 19th.

Q. It could have been the day following the crash?

A. It could have been the day following.

The Court: You are sure that was found at the scene of the accident?

A. Yes, sir. I was there when Mr. Ammon picked the thing up, picked it up in pieces, held it in his hand and it was later when the CAA took the photostat of it.

The Court: And you are talking to the jury.

(Testimony of Edwin E. Evans.)

not—you are not trying to convince me, you are trying to convince the jury.

A. I'm sorry.

Mr. Talbot: I offer Exhibit M in evidence, your Honor.

Mr. Nesbett: Object on the same ground, your Honor.

The Court: It may be received in evidence. I think it's been connected up. It's been connected up by the flight numbers and the name of the numbers on the plane.

Q. (By Mr. Talbot): I will ask you this, Mr. Evans, with reference to the movement of dynamite from Iliamna Bay to Big Mountain: [171] Did you undertake that on your own initiative or on instructions from your home office?

A. I took it on the instructions from my home office.

Mr. Talbot: Now you may examine, sir.

EDWIN E. EVANS

testifies as follows on:

Cross-Examination

By Mr. Nesbett:

Q. How did you receive those instructions from your home office, Mr. Evans?

A. They were verbal instructions issued to me by Mr. Ralph Pritchard, my superintendent, my supervisor.

Q. Pritchard? A. Pritchard.

(Testimony of Edwin E. Evans.)

Q. Where was Mr. Pritchard stationed?

A. He was stationed—he was the field man. His home office was here in Anchorage, but he was the man that covered the complete field at the time.

Q. And he was your immediate superior, was he?

A. That's right, sir.

Q. Mr. Pritchard owned an airplane or half interest in an airplane that was flying with Circle Trail Airways or Bill Smith's Airways in that area at that time, wasn't he?

Mr. Talbot: Object, your Honor. [172] irrelevant.

The Court: Overruled. You can answer.

A. Not to my knowledge.

Q. Do you know that Pritchard owned an airplane that Bill Smith was flying at all?

A. Later on.

Q. Later on? A. Yes.

Q. And Bill Smith and Pritchard were flying that airplane commercially, were they, on charter flights?

A. Not to—that's beyond me. I have no knowledge of that, sir.

Q. Did Pritchard, Mr. Pritchard come to the site and give you verbal orders to move the dynamite then? A. Yes.

Q. I see. Now, I believe—are you still with MK? You're not—you're with Federal Electric, aren't you? A. I'm with Federal Electric now.

Q. Do you recall the approximate date you left the employment of Morrison-Knudsen?

(Testimony of Edwin E. Evans.)

A. Yes, I left them on the—well, the exact date the day after Thanksgiving. When was Thanksgiving——

Q. Well, Thanksgiving of what year, sir?

A. This year.

Q. Of 1956? A. 1957. [173]

Q. 1957? A. Yes.

Q. Now, Mr. Evans, do you have any interest in the outcome of this case?

A. None whatsoever.

Q. None whatsoever?

A. None whatsoever.

Q. Now, I believe you testified, did you not, that you had occasion to estimate the personal effect strewn around the wreckage as being 70 pounds?

A. Yes, sir.

Q. Was that at the time of the crash or immediately thereafter when you went up to visit the scene?

A. It was shortly after. I believe it was Sunday afternoon, the day of the 18th.

Q. Did you—— A. We——

Q. Pardon me. Did you, in estimating the weight at 70 pounds, go around and life various articles and check them to see——

A. No, sir. The reason that I am saying——

Q. I didn't ask you the reason. I asked you what you did, sir. A. No, sir.

Q. Did you make a list of the articles so that you could [174] consider them as a whole in estimating them to be of 70 pounds in weight?

(Testimony of Edwin E. Evans.)

A. George Ammon made a list of it.

Q. George Ammon. Well, who made the estimate of weight?

A. Well, just roughly between Mr. Ammon and myself.

Q. Did you make the estimate or Mr. Ammon?

A. I believe Mr. Ammon did.

Q. Then you didn't make the estimate of 70 pounds at all, is that correct?

A. That's right.

Q. And you think 35 pounds, on second thought, might be more accurate or would you say that that was at least the weight?

A. Well, I would say that you would be sure of it being 35 pounds, I'll put it that way.

Q. Well, now, was Mr. Haley's body lying over there to the left of the airplane while you were doing this or was it later on in the day?

A. It was after the body had been moved.

Q. And after the body had been moved you went up and commenced to estimate the weight of the personal effects that Haley might have had in the airplane, is that about the size of it?

A. Well, yes, I believe it was.

Q. Mr. Evans, did you testify in response to a question on [175] direct that you counted 16 boxes of dynamite cartons in the area of the wreckage?

A. I did count 16 boxes of cartons, containers.

Q. 16 containers in the area?

A. Yes, sir.

(Testimony of Edwin E. Evans.)

Q. Did you do that immediately after the accident? A. Shortly after.

Q. How soon afterward?

A. Sunday afternoon, the day of the 18th.

Q. Had anyone had an opportunity to disturb or move any of the wreckage?

A. No, they had an opportunity but I'm sure that there was nothing disturbed in any way. They had strict orders not to disturb it.

Q. You were camp site supervisor, were you not?

A. That is right.

Q. Were your orders to the effect that no one should disturb the area of the wreckage?

A. That is right.

Q. And do you feel reasonably sure that no one did disturb it?

A. I am very sure that it was not disturbed at all until the inspectors were there, except for remove the body.

Q. Did you count—you are sure you counted 16 cartons in that area? [176]

A. That's right, sir.

Q. I will ask you whether or not you had occasion to talk with one—with a Mr. Clark representing the Civil Aeronautics Board shortly after the accident? A. Some; very little.

Q. Didn't you tell Mr. Clark shortly after the accident that the best you could see was approximately 8 cartons in the area of the accident?

A. I did not, sir.

Q. You refused to sign a written statement for

(Testimony of Edwin E. Evans.)

Mr. Clark, didn't you? A. No, sir.

Q. You did not refuse to sign a written statement for Mr. Clark?

A. I was never requested or asked to sign a statement.

Q. Then your testimony is you did not sign a written statement for Mr. Clark and you did not refuse to sign a written statement for him?

A. That is right, because I was not asked to sign one.

Q. Did you tell Mr. Clark you wouldn't sign one if one was prepared and you were asked to sign it? A. I did not.

Mr. Nesbett: May I see Photograph 2 of Exhibit D?

Q. I hand you Photograph 2 of Defendants Exhibit D, Mr. Evans. Are those relatively square objects pictured on [177] the ground in the area of the fusilage the dynamite cartons that you saw at the scene of the wreckage?

A. These in this picture, I would say yes.

Q. Are those cartons similar to this carton?

A. That is right, sir.

Q. Did you count such cartons in the area of the scene of the accident in order to arrive at the figure of 16? A. I did, sir.

Q. And did you find any of the boxes of dynamite with any dynamite left in them?

A. No, not to my knowledge.

Q. There were sticks of dynamite scattered over the whole area? A. That is right.

(Testimony of Edwin E. Evans.)

Q. Some of the sticks were broken, some charred, were they not? A. That's right.

Q. And no box was intact, was it?

A. No, definitely not.

Q. Some of the cartons had burned, had they not? A. No.

Q. None had burned?

A. None had burned.

Q. None whatsoever?

A. To my knowledge there was no burned [178] cartons.

Q. Did you count 16, then, cartons—whole cartons?

A. I counted 16 of what I figured were the tops of the cartons with the manufacturer's name and so that I was sure I did not get the bottoms mixed in with the tops.

Q. Were you there while Mr. Clark of the Civil Aeronautics Board was there examining, too?

A. I was.

Q. Did you attempt to assist him in any fashion?

A. Just to answer questions that he asked.

Q. Well, you were there at the time he was investigating and examining the scene of the accident, weren't you? A. Right.

Q. Did you attempt to assist him in determining how many cases or boxes of dynamite were on that plane? A. I did not.

Q. Did you help him to gather up or collect in one spot the remainders of the cartons that were there? A. No, sir.

(Testimony of Edwin E. Evans.)

Q. Is it your testimony that you yourself investigated and found 16 box tops?

A. That's right.

Q. Were you excluding the box bottoms?

A. Right.

Q. Now, some of the box tops were burned, were they not, partially burned? [179]

A. Could I make a suggestion, please? The gases from the inside of that box is liable to give somebody a headache.

Q. Well, would it hurt anyone at this distance?

A. Maybe not.

Q. Well, is there a possibility that it might?

A. It's very possible.

Q. There are 2 sections to each box, is there not?

A. That's right.

Q. And did you count 32 sections in the area of that wreckage?

A. I wouldn't say that I counted 32 sections. I counted 16 sections, enough to make up 16 cartons.

Q. Mr. Evans, why were you so concerned to go around counting the carton tops?

A. I have to see that there was a record kept of the materials that was used and consumed on the base, on the site.

Q. And is that the reason you went around checking box tops? A. That's right.

Q. Was there no other method you could have determined how many boxes were on that airplane?

A. Not to my knowledge.

Q. Not to your knowledge?

(Testimony of Edwin E. Evans.)

A. That's right.

Q. And did you find the 16 bottoms to the [180] cartons?

A. I—as I say, I didn't count the bottoms. I checked through and got enough tops to make sure that there was a—there had been a container.

Q. Well, and they were Atlas carton tops?

A. I'm sure they were. I could be wrong, but it seems to me, it runs in my mind it's so long ago, that it was Atlas powder.

Q. Well, you said previously on direct that you could be wrong, you didn't know whether it was Atlas or some other brand? A. I did.

Q. Wouldn't you have a remembrance of the brand if you'd gone around and counted 16 box tops?

A. Well, it seems like I should, but I do not remember, sir.

Q. But you do remember counting 16 tops?

A. Right.

Q. Were all those—were all those tops intact and together? A. No, sir.

Q. Then you had to take pieces of tops and put them together in order to piece out a whole top and determine here's one top, is that correct?

A. They were mangled, sir, and tore up some, sir, but there wasn't—not tore so bad that you couldn't tell it was a complete top. [181]

Q. They were not all intact, in one piece, the tops I refer to?

A. Well, I wouldn't say all of them intact. There

(Testimony of Edwin E. Evans.)

might have been a little corner torn off. There was enough of them tore up a little bit that you could tell the top.

Q. There were sticks of dynamite scattered all around the wreckage, some broken, some charred, some laying there intact? A. Right.

Q. Now, is it your testimony that all that dynamite got out of the box without tearing the tops into fragments?

A. That is my testimony, sir.

Q. That the tops were all intact?

A. I didn't say they were all intact. I said they were broken up some but they were straining together enough that you would tell—could tell they were a box top.

Q. Did you have to put fragments together at all in any instance in order to piece out a whole top? A. No.

Q. You did not? A. I didn't.

Q. In other words, the top was there in one piece, enough intact sufficiently to call it a whole top? A. Yes, remains of a whole top. [182]

Q. The top was not separated in any instances in 2 pieces, is that correct?

A. Yes. As I say, it was separated in 2 pieces to the extent that corners were torn off and the end probably busted out of it.

Q. Some of them were separated in many more than 2 pieces, weren't they, the tops?

A. To my recollection, I can't recall them being separated more than that.

(Testimony of Edwin E. Evans.)

Q. Then is it your testimony that you didn't have to piece together any single top in order to determine that there was one whole top?

A. That's right.

Q. And you were able to just walk around and count 16 tops?

A. It took some recheck on it.

Q. And a recheck? A. 16 boxes.

Q. I'm talking about your first check. I believe your testimony was you counted 16 boxes of dynamite in the area of the wreckage? A. Right.

Q. And you counted 16 tops and were able to identify them immediately in the area of the accident, disregarding the bottoms. Is that your testimony? A. That is my testimony. [183]

Q. And you did that immediately after the wreckage?

A. Shortly after. I couldn't—wouldn't say immediately after.

Q. Well, on the same day? A. Yes, sir.

Q. That was a Sunday, wasn't it?

A. That's right.

Q. And you disregarded the bottoms?

A. That's right.

Q. How far were those box tops, generally speaking, from the area of the fusilage, wreckage?

A. Well, some was right near the wreckage and some was the extent of 75 feet or more from the wreckage.

Q. I see. Generally 75 feet would describe the diameter of the area surrounding the wreckage that you found the box tops?

(Testimony of Edwin E. Evans.)

A. Well, it wouldn't cover the diameter. I would say that the right-hand side next to the road the boxes were approximately 75 feet on the right-hand side. They were not near so far from the plane.

Q. 75 feet would be the maximum distance of the area, would that be right, in any given direction? A. Yes; right.

Q. Now, can you look at Photograph No. 2 of Exhibit D and state whether that picture covers an area within 75 feet [184] on each side of the area of the wreckage of the fusilage?

A. I would say approximately 75 feet. I may be off 10, 15 feet but I'd say that, your Honor, that it's—I would say about 75 feet.

Q. And that picture, Mr. Evans, should show somewhere in there in some fashion the 16 box tops that you saw at the time, shouldn't it?

A. It should.

Q. Shouldn't it? A. Uh-huh.

Q. Also in the picture would be the 16 box bottoms that were also part of that load, if your testimony is correct; wouldn't they be in the same picture? A. Well, it's very possible they are.

Q. They should be?

A. To the right here, it could be. I couldn't say that this covers the outside 75 feet to the right of the picture as I look at it, but——

Q. Well, you just said you thought it did within 10 feet one way or the other?

A. Okay, we'll leave it that way.

Q. All right. Then that picture should show in some fashion or other the 16 intact box tops that

(Testimony of Edwin E. Evans.)

you saw in the area right after the wreckage as well as the [185] 16 box bottoms, also, shouldn't it?

A. Right.

Q. Can you look at it and point out—strike that. Can you look at that picture and mentally total the number of objects that in your opinion would represent a box top or bottom and then strike a mental total of the box tops you see in the area?

A. Well, not from the picture you couldn't.

Q. Well, now, why can't you from the picture?

A. Because you can't in the picture because it doesn't bring out the reading.

Q. Doesn't bring out the reading on the carton as to whether it would be a top or bottom?

A. That is right.

Q. Can you count the total and determine whether there are 32 objects which would be either a box bottom or a box top?

A. No, sir. Not from the picture I couldn't.

Q. Well, there are some objects in view there that certainly appear to be either a top or bottom of a box, aren't there?

A. Well, it could be maybe brought out and magnified to that effect, but I wouldn't state by looking at this picture just which is which.

Q. But aren't there some objects in that picture that [186] obviously are either a box top or box bottom? A. That's right.

Q. Now if the box tops were all intact, presumably the box bottoms were reasonable intact, were they not? A. Uh-huh.

(Testimony of Edwin E. Evans.)

Q. You should then therefore be able to see approximately 32 objects in that picture that would be either a box top or box bottom, isn't that right.

Mr. Talbot: Object to that, your Honor.

The Court: Sustained. You are arguing with the witness and I don't know anything to say that these boxes should be one one side of the plane or the other. It was a crash. I don't know which way the boxes went.

Mr. Nesbett: He said, your Honor, some on one side and some on the other, as I recall.

The Court: I know, but there may be some behind the plane, too, that you can't even see. But you are arguing with the witness.

Mr. Nesbett: Well, your Honor, certainly I wouldn't want to suggest that your Honor might assist the witness in his testimony. He either knows what he's talking about or he doesn't. If there is an area behind the plane——

The Court: You can argue to the jury about the witness' effect to the testimony but you can't argue with the witness. [187]

Q. (By Mr. Nesbett): Well, Mr. Evans, will you take the picture which is Photograph 2 of Exhibit D and count the objects shown on that picture that could represent either a box top or box bottom?

A. It's pretty hard to do with this coloring—background, with the type of eyes I have. I have very poor eyes and—(Short pause.) The picture doesn't clarify that I could make an exact count. There's cartons there in the dark background that

(Testimony of Edwin E. Evans.)

I couldn't distinguish exactly the boxes in this picture from rock.

Q. I asked you to see if you could count the total number of objects that might be box tops or bottoms and your answer, sir, that you are not able to do it from that photograph?

A. That is right, sir. I can determine a few, here. I can see about 9 that I know are box tops. There are other objects here that I wouldn't be certain of.

Q. You could see 8 or possibly 9 and that is the maximum, isn't it? A. That is right.

Q. Mr. Evans, who was in charge of the Big Mountain airstrip, if you know?

A. Who was in charge?

Q. Yes, sir. [188]

A. There was nobody outside of just myself and I had no authority over the airstrip, the fact that I was only building it under construction for Morrison-Knudsen Company; subcontractors was Western Electric.

Q. With whom was Western Electric contracting? A. Air Force.

Q. It was an Air Force strip ultimately?

A. It was to be an Air Force strip.

Q. Who established the wind socks, the wind indicators at either end of the runway of that strip?

A. I recall George Ammon, the first aid man, put the wind sock up.

Q. And at whose direction did George Ammon do that?

(Testimony of Edwin E. Evans.)

A. Through Mr. Haley and myself.

Q. Now, did any official of the U. S. Air Force, such as an officer, later change the location of those wind socks? A. Yes.

Q. He was an Air Force Colonel, was he not?

A. I couldn't say who done it. It was done after I left the site, sir.

Q. Oh, was it done afterwards?

A. Yes. I returned to Big Mountain last summer and the wind socks had been changed.

Q. Weren't they changed, Mr. Evans, while you were there? A. No, sir. [189]

Q. I see. Did you know that Colonel of the Air Force exercised direct control over that airstrip insofar as airplanes using it were concerned?

A. I did not.

Q. Now at the time you were constructing this road—and where was your office located, Mr. Evans?

A. Down at the base camp, right on the shore of Lake Iliamna.

Q. You were constructing a road at the time of this accident, weren't you?

A. That's right.

Q. And where was the road—where was it headed?

A. It was headed up to the permanent site.

Q. And was that at the top of Big Mountain?

A. That's right.

Q. That, I believe you said, was an electrical or high frequency installation?

(Testimony of Edwin E. Evans.)

A. Some micro-wave system, yes.

Q. Did you know at the time exactly what the nature of the installation was, or was it confidential or hush-hush?

A. I would say that I didn't know exactly what it consisted of. I know that it was a micro-wave system but I didn't know what it consisted of. In fact, we hadn't even seen the building plans. [190]

Q. Was it a part of the Distant Early Warning network that was being constructed on the White Alice?

A. Continuance of the Dew Line, yes, which was known as the Early Warning System.

Mr. Nesbett: Your Honor, it's practically noon. I wonder——

The Court: Well, I want to finish with this witness before we recess.

Mr. Nesbett: I see.

The Court: Well, I suppose we could take our recess now and come back at 1:30. I'd like to push this case along a little bit. Now, may I inquire how many more witnesses you have?

Mr. Talbot: No more.

The Court: This is your last witness?

Mr. Talbot: Yes, your Honor.

The Court: And assuming that this is the last witness of the Defendant, how many witnesses do you have?

Mr. Nesbett: Your Honor, there's so many ramifications of the defenses it would be difficult to say. I'd say maybe 3. I've got to check.

(Testimony of Edwin E. Evans.)

The Court: I think we better come back at 1:30. Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone. You are not allowed to have [191] anyone discuss it with you. We are going to recess until 1:30. Is there any member on the jury now that doesn't understand that? Does any member of the jury think they are coming back at 2:00 o'clock? You all remember, now, that you are coming back here at 1:30. All right, court will stand in recess until 1:30.

(At 1:30 o'clock p.m., June 3, 1958, counsel for plaintiff being present and counsel for defendant being present, the trial of said cause was resumed:)

The Court: Is it stipulated that the jurors are present in the box, the jury is present in the box?

Mr. Talbot: Yes

Mr. Nesbett: Yes

The Court: You may proceed.

Mr. Nesbett: May I see the Defendants Exhibit M?

Deputy Clerk: You have it, your Honor.

The Court: Here.

Q. (By Mr. Nesbett): I hand you, Mr. Evans, Defendants Exhibit M which appears to be a fragment of a manifest. Is that document you said was recovered by Mr. Ammon near the scene of the wreckage of the airplane?

(Testimony of Edwin E. Evans.)

A. As I see it, it is, yes.

Q. Did Mr. Ammon himself pick it up? [192]

A. As I recall it he did, yes.

Q. As you recall it. Well, do you recall the scene and the incident and your first sight of that document? A. Yes I do.

Q. Approximately how far from the wreckage of the fusilage of the airplane would you say this document was found?

A. I would say approximately 5 feet, maybe 6 feet.

Q. Was the document—did you see Mr. Ammon pick it up? A. Yes I did.

Q. Was the document lying on the ground at the time he picked it up?

A. I couldn't say to that. I seen Mr. Ammon stoop over and pick up the fragments or pick up the pieces of something and then that's when he called me over and showed then to me.

Q. The exhibit M was in a number of pieces, was it not? A. That's is right. It was, sir.

Q. And Mr. Ammon picked up all the pieces he could find, wasn't that correct?

A. Yes, sir, I believe so.

Q. And did he give those pieces to you, Mr. Evans? A. No, sir. He did not.

Q. What did he do with them?

A. He kept them on himself. I can't recall just what type of container he put them in, and held them and showed them to the CAA [193] investigators.

(Testimony of Edwin E. Evans.)

Q. Well now, when did he show them to the CAA investigators?

A. Well, if I recall right it was down at the office in the lower base camp.

Q. Were you present when he showed them to the CAA investigators?

A. I wasn't present when he showed them, sir. I was present shortly after when they were talking about them and they had them spread out in the office.

Q. The CAA investigator had that document that you have before you spread out in your office?

A. That's right.

Q. Are you sure of that? A. Yes, sir.

Q. As a matter of fact, don't you know that Exhibit M was forwarded to the CAA approximately —pardon me—forwarded to the main office of Morrison-Knudsen approximately 10 days after the accident?

A. That could have been, sir.

Q. It could have been? It was the fact, wasn't it? A. Not to my knowledge.

Q. That document was not given to Mr. Clark of the CAA when he visited the scene and made an investigation, was it?

A. To my knowledge it was.

Q. Do you know that Mr. Ammon kept that in his possession [194] until it was given to a CAA or CAB official? A. I do not.

Q. Well, you were job site superintendent, were you not? A. That's right.

(Testimony of Edwin E. Evans.)

Q. Mr. Ammon was first aid man, was he not?

A. That's right.

Q. Were his other duties to be catskinner?

A. No, sir.

Q. What were his other duties?

A. His duties were strictly first aid work and reports on the activity of the safety measures of the camp.

Q. Well, didn't Mr. Ammon also run a Caterpillar? A. No, sir.

Q. Now, was Ammon—part of Ammon's duties to preserve documents in situations such as that or was it your duty as camp site superintendent?

A. Well, I would say that it was Mr. Ammon's responsibility, being the first aid man and the man that talked to the CAA people more than I did.

Q. You did talk with him didn't you?

A. Some.

Q. You talked with Mr. Clark, who was investigating the accident? A. Very little.

Q. And you talked with Mr. Rogers who was there, did you not? [195]

A. I believe I did, yes.

Q. You talked with Mr. Mauer, the chief pilot of Cordova Airlines, did you not?

A. Very little.

Q. And you have seen him here in the courtroom, haven't you? A. I have.

Q. And you had conversations with Mr. Clark? On at least 2 different occasions during the time

(Testimony of Edwin E. Evans.)

he was there in the presence of Mr. Mauer, did you not?

A. Conversation—I would say I had it with him once. I can't recall the second time. I can't quite distinguish the people apart in the group that was there.

Q. Now, do you recall the conversation with Mr. Clark when Mr. Mauer was present, Mr. Clark being the CAA investigator? Do you recall the conversation with him when Mr. Mauer was present in which Mr. Clark asked you, "Do you know how many cases of dynamite were on that airplane?" To which question you answered, "I don't know"?

A. Not to my recollection; no, sir.

Q. Could the conversation have occurred and you not recall it? A. I don't believe so.

Q. You don't. You say not to your recollection, but you [196] weren't certain that it didn't occur, were you?

A. Well, I'm pretty certain, sir. I don't believe it did.

Q. You had conversations with Clark in Mr. Mauer's presence, didn't you?

A. As I recall, the only conversation I had with those people to speak of at all was while Mr. Mauer and the gentlemen concerned of the CAA—we were on our way to the lower base camp for lunch and the conversation was carried on more between Mr. Mauer and the CAA group than it was concerning myself in any way.

Q. Don't you recall in that conversation prior

(Testimony of Edwin E. Evans.)

to lunch Mr. Clark saying to you, camp site superintendent, "Do you know how many boxes of dynamite Haley had aboard"?

Mr. Talbot: Objected to as having been asked and answered.

The Court: Overruled.

A. As I say, I don't recall. I don't recall the question.

Q. What authority did Mr. Ammon have around that Big Mountain campsite, other than being first aid man?

A. That was his authority only. He was just strictly a first aid man and as I say, kept records and he had to make a report to his superiors here in town, which is a department of its own, on the safety measures and any accidents that took place on the site.

Q. And of course treat any injuries that might come to his [197] attention?

A. That is right, sir.

Q. Did he have any administrative functions other than that, or responsibilities?

A. No, sir.

Q. You knew Mr. Ammon had these fragments of that document at the time Mr. Clark was there, didn't you?

A. To my knowledge he did, yes.

Q. Did you tell Mr. Clark that Mr. Ammon had those fragments? A. I did not.

Q. Did you tell Mr. Mauer, the chief pilot for Cordova Airlines? A. I did not.

(Testimony of Edwin E. Evans.)

Mr. Nesbett: I believe that is all, your Honor.

Mr. Talbot: Mr. Evans, suppose that one of your own men had been killed in an accident, who would have been the person to take charge of the personal effects?

A. That would have been the first aid man.

Mr. Talbot: No further questions.

The Court: May this witness be excused?

Mr. Talbot: Yes he may, as far as we are concerned, your Honor.

Mr. Nesbett: Yes, your Honor.

The Court: You may be excused.

(Thereupon, the witness retired [198] from the stand.)

The Court: Call your next witness.

Mr. Talbot I have no other witnesses, your Honor. I have still the problem of Mr. Smith's deposition, and——

The Court: Well, it seems to me although the authorities you have given me indicate that it could be used, it seems to me Mr. Smith is here, you can put him on the stand and ask him exactly the questions that are in the deposition and then the jury would have a chance to evaluate the testimony of Mr. Smith by observing the way he answered the questions and his demeanor upon the stand and so forth and so on. I think it would be a better procedure than try and read from the deposition, so I will sustain the objection and let you call Mr. Smith and ask him those questions.

Mr. Talbot: Very well. If you will take the stand again, Mr. Smith.

The Court: Then if Mr. Smith doesn't answer the questions the same way you can read the answers to show that he is impeached.

Mr. Talbot: That's what I didn't want to do with Mr. Smith. I don't think he can be impeached, your Honor.

The Court: All right.

MERLE K. SMITH

resumes the witness stand and testifies as [199] follows on

Recross-Examination

By Mr. Talbot:

Q. I ask you this question, Mr. Smith: Now, concerning movements of that aircraft——

Mr. Nesbett: Now, your Honor, I would ask the page number?

Mr. Talbot: Oh, yes, this question is on page 4.

Q. Now, concerning movements of that aircraft during the period that it was chartered to Morrison-Knudsen, what control if any did Cordova Airlines have over the question of where the aircraft went and what work it performed?

A. I believe my answer to that was that we had no control over; MK had charge of the aircraft as to its movements.

Q. Would you say that your control was through the pilot? A. Yes.

Q. And the pilot was paid by you?

A. Yes.

(Testimony of Merle K. Smith.)

Q. And he was your employee?

A. Yes.

Q. Had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?

Mr. Nesbett: Your Honor, I'd like to know the page number.

Mr. Talbot: I'm sorry, Mr. Nesbett; page 20.

Mr. Nesbett: And further I object to reading the [200] question and asking the witness to answer it again. If he wants to use the deposition I suggest the witness be at least permitted to see his previous answer.

The Court: No, he's not being asked—questioned on the ground of impeachment at all. If it was impeachment he would be entitled to see the deposition and read his answer, but I'm requiring the counsel to put the questions that were put to him, rather than read the deposition. Objection overruled.

Mr. Nesbett: Page?

Mr. Talbot: Page 20, about two-thirds of the way down. May I have the question read back, please?

The Court: Well, you've got the question there. Start all over again.

Mr. Talbot: All right.

Q. (By Mr. Talbot): "Question: Now, had any change or modification been made in the gas tanks or the gas carrying capacity of this plane since it came from the factory?"

(Testimony of Merle K. Smith.)

A. No.

Q. No additional gas tanks had been added?

A. No.

Q. None had been taken out? A. No.

Mr. Talbot: No further [201] questions.

MERLE K. SMITH

testifies as follows on:

Further Redirect Examination

By Mr. Nesbett:

Q. Mr. Smith, did Cordova Airlines have any way of knowing what flight activities Haley, the pilot, was engaged in from day to day over in the Iliamna area? A. No.

Q. What instructions, if any, were given to Haley when he went out on this job with respect to flying this airplane for MK?

A. He was told to place himself at the disposal of the superintendents and whoever was in charge of MK operations in the Iliamna area, and to do as they requested.

Mr. Nesbett: No further questions.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

Mr. Talbot: Your Honor, there are various exhibits in evidence which I would like to read portions of to the jury before——

The Court: Why can't you read the exhibits after the argument rather than read them now?

Mr. Talbot: I would rather do it that way.

The Court: I see no objection to reading [202] the exhibits in the argument rather than——

Mr. Talbot: I don't either, your Honor, but I didn't want to be foreclosed.

The Court: No, I will allow you to read from the exhibits in the argument.

Mr. Talbot: Thank you.

The Court: I think you have a right to.

Mr. Talbot: The defense rests, your Honor.

Mr. Nesbett: We will call Mr. Mauer.

GRAHAM MAUER

called as a witness in rebuttal for and on behalf of the Plaintiffs and being first duly sworn testifies as follows on:

Direct Examination

By Mr. Nesbett:

Q. What is your full name, Mr. Mauer?

A. Graham Mauer.

Q. By whom are you employed?

A. By Cordova Airlines.

Q. How long have you been employed by Cordova Airlines? A. 6 years.

Q. Are you a pilot? A. Yes, I am.

Q. Have you been a pilot during the entire 6 years of your employment with Cordova?

A. Yes, sir. [203]

Q. How long have you been a pilot, Mr. Mauer?

(Testimony of Graham Mauer.)

A. I started flying in 1937.

Q. And have you been a flyer ever since 1937?

A. With the exception of one year teaching school.

Q. Now, what capacity did you have with Cordova Airlines in December of 1955?

A. I was the chief pilot for Cordova.

Q. And as chief pilot, generally speaking, what were your responsibilities?

A. Well, my responsibilities were to hire pilots, check them out and see that they were qualified to do the job that would be asked of them.

Q. Calling your attention to the dates of December 18 and 19 of 1955, I will ask you whether or not you had occasion to investigate the scene of an accident on behalf of your company?

A. Yes; I did.

Q. Where was that accident and who was the pilot?

A. The accident occurred on the south slope of Big Mountain on the south shore of Iliamna Lake, and the pilot was Herbert Haley.

Q. Mr. Mauer, on what day did you first visit the scene of that accident?

A. We arrived at the scene of the accident at 10:30 on the morning of the 19th. [204]

Q. And would that be the morning of the day after the accident? A. Yes, sir.

Q. To the best of your knowledge?

A. To the best of my knowledge.

(Testimony of Graham Mauer.)

Q. Now, why did you go to the scene of the accident?

A. Primarily I wanted to see what the cause of the accident was to protect the company in anything that might come up and also to remove Mr. Haley's body and bring it into Anchorage.

Q. Did you investigate the scene of the accident, the airplane and the area surrounding or adjacent to the wreckage? A. Yes, sir, I did.

Q. Were you able to determine from your investigation the reason for the accident?

A. No, sir.

Q. And did you meet a Mr. Evans when you were there at the scene of the accident?

A. Yes, sir, I did.

Q. Did you meet a Mr. Clark from the Civil Aeronautics Board? A. Yes, sir.

Q. Did you meet a Mr. Rogers of the CAA?

A. Yes, sir. [205]

Q. Mr. Mauer, I will show you Photograph No. 2 of Defendants Exhibit No. D and ask you if you can recognize the scene in that photograph?

A. Yes, sir, I do.

Q. And what is it?

A. It shows the wreckage of the 180 on the south side of the mountain with the shore of Lake Iliamna, the south shore, in view of the distance there.

Q. Do you know who took the picture?

A. No, sir, I do not.

Q. Were you there when the picture was taken?

A. There was numerous photographs taken when

(Testimony of Graham Mauer.)

I was there. I couldn't say whether this one was taken at that time.

Q. Now, Mr. Mauer, did you know that Pilot Haley was carrying dynamite for Morrison-Knudsen in the Iliamna area prior to the accident?

A. No, sir, I did not.

Q. Did you ascertain or learn that fact after you went to the scene of the accident?

A. I learned it at the time of the accident, shortly after the accident when the report came into Anchorage.

Q. Did you have occasion to observe the remains of dynamite cartons in the area of the scene of the wreckage? A. Yes, sir.

Q. And do you recognize the carton such as this carton [206] sitting on the table? A. Yes, sir.

Q. Do you recognize it as representative of the cartons that appeared near the scene of the wreckage?

A. It appears similar in shape. The condition of those at the wreckage were in such badly beat up condition that it would be pretty hard to say that those in the aircraft were in exactly the same size as that one.

Q. Generally speaking, looking at that carton would you say that it is representative of the cartons that were carried by Haley at the time of the plane crash?

A. Yes, sir, I believe I would.

Q. Now, during the course of your investigation there at the scene of the accident did you attempt

(Testimony of Graham Mauer.)

to determine how many cartons of dynamite Haley had on board the plane when it crashed?

A. Yes, sir, we did.

Q. And as a result of that effort, investigative effort, did you arrive at any conclusion?

A. As near as we could figure, myself and the CAA members who were there, taking into account all the number of pieces and the various condition that they were in we arrived at the figure of 8 cases of dynamite that could have been aboard.

Q. Now, what was generally—describe for the court and [207] jury what was generally the condition of the cartons in the area of the scene of the wreckage?

A. Well, to the best of my knowledge, there was not one single intact carton in the entire area. Every carton there was torn, split, broken in numerous pieces.

Q. Did you attempt to determine from a count of the reasonably intact cartons in the area how many were aboard? A. Yes, we did.

Q. Is that how you arrived at your figure of 8?

A. Yes, sir.

Q. Was Mr. Clark attempting to do that at the time you were there? A. Yes, sir.

Q. Did Mr. Evans take any part in that activity?

A. No, sir, I don't believe he did.

Q. Now, can you state for the benefit of the court and jury the approximate distance over which these dynamite carton fragments were scattered?

(Testimony of Graham Mauer.)

A. To the best of my knowledge, from about 50 foot beyond the initial impact of the aircraft there was dynamite scattered from that point, 50 foot from the initial impact to 50 to 75 foot beyond the aircraft after it came to rest and 75 feet to 100 feet either side of the path that the aircraft made sliding down the mountain. [208]

Q. Now, then, will you state if you can the approximate distance between the point of initial contact of the airplane with the earth and the point at which it came to rest?

A. We measured that; exactly 300 feet.

Q. Then is it your testimony that dynamite cartons were scattered from the point of initial contact to the resting place of the fusilage and up to 75 feet beyond?

A. No, sir. I don't believe I said that.

Q. State again the distance in feet that these cartons were scattered over.

A. The aircraft hit 50 feet after it hit. There was a—there's slide marks and 50 foot from the initial point of contact that's where the dynamite started, and then for 75 foot beyond that or beyond the point where the wreckage came to rest. In other words, the dynamite was scattered from 250 feet behind where the aircraft rested to 75 feet beyond where the aircraft rested.

Q. Do you recall a conversation with Mr. Clark of the CAB in the presence of Mr. Evans during which conversation Mr. Clark asked Mr. Evans if

(Testimony of Graham Mauer.)

he knew how many cartons of dynamite were on that plane at the time it crashed?

A. Yes, sir, I do.

Q. What did Mr. Evans say in response to Mr. Clark's question? [209]

A. I believe Mr. Evans says, "I don't know."

Q. I show you Defendants Exhibit M to observe. You have seen that before, haven't you, Mr. Mauer?

A. Yes, sir.

Q. And did you see that exhibit at Big Mountain at the time you were there investigating the cause of the crash?

A. No, sir, I did not. I would have liked to.

Q. Did you know that it existed?

A. I did not.

Q. Mr. Mauer, during the time you were at the scene of the accident, did you attempt to determine how many gallons of gasoline Mr. Haley might have had upon board of his airplane at the time it crashed?

A. Yes, I did but I could see no reason how I could determine it.

Q. Well, were you able to come to any conclusion? A. No, sir.

Mr. Talbot: Object, your Honor.

The Court: Overruled; he says no.

Mr. Nesbett: I'd like to see the exhibit which is the flight log of the airplane of December 17th.

The Court: On the 17th?

Mr. Nesbett: Yes.

Deputy Clerk: "L."

(Testimony of Graham Mauer.)

The Court: Here it is. Has that been [210] admitted into evidence?

Deputy Clerk: For identification only.

Mr. Talbot: That's—I believe that is the wrong exhibit.

Mr. Nesbett: That is the wrong exhibit. The aircraft log.

Mr. Talbot: "K."

Deputy Clerk: Here it is.

Q. (By Mr. Nesbett): Mr. Mauer, here is Exhibit K which is the aircraft log of December 17, 1955. Can you, Mr. Mauer, examine that exhibit and determine from the notations on it how many gallons of gasoline Mr. Haley had on that airplane on the morning of the 18th or approximately at the time of the crash?

A. No, sir, not from this form I cannot do it.

Q. Mr. Mauer, that form indicates on the left-hand portion as the bottom entry a figure. I believe it's 35, is it not? A. Yes, sir.

Q. In the ordinary course of Cordova Airlines business what would that indicate?

A. Well, it would probably indicate gasoline added sometime during the day.

Q. Now, could you say, according to company routine, that [211] it was gasoline added at the end of the day or during the period of day or at any time?

A. It could have been added first thing in the morning. I mean it could have been added any

(Testimony of Graham Mauer.)

time during the day or possibly even the night before.

Q. Now, as chief pilot of Cordova Airlines, can you say that in looking at a form such as that with those figures on it that Herbert Haley had 55 gallons of gasoline on board his airplane when he commenced operations on the morning of the 18th of December, for example?

A. No, sir, I cannot tell that from this form.

Q. Now, in your duties with Cordova Airlines you have had occasion to fly the bush in almost every area of Alaska, haven't you?

A. Yes, sir.

Q. And in most types of modern bush airplanes, is that correct? A. Yes, sir.

Q. Mr. Mauer, do you know who owned that airstrip at Big Mountain?

A. The United States Air Force.

Q. Were you able to determine from your investigation the reason why Herb Haley crashed into the mountain there?

Mr. Talbot: Object as having been asked and answered, your Honor. [212]

The Court: Read the question.

(Thereupon, the reporter read Question, Line 22, Page 212.)

The Court: Sustained. He said a little while ago he couldn't.

Q. (By Mr. Nesbett): Did he crash into the side of the mountain? A. Yes, he did.

(Testimony of Graham Mauer.)

Q. Mr. Mauer——

A. Mr. Nesbett, may I make a correction? I apparently misunderstood your former question. You asked me if I knew exactly what caused the airplane to crash and I said no, I did not exactly.

Q. I understand all right. Now, in your duties with Cordova Airlines have you had occasion to fly Cessna 180 airplanes?

A. Yes, numerous times.

Q. Do you know approximately the number of hours you have had in the air in that type airplane?

A. It's in the neighborhood of 300.

Q. As a result of your investigation there at Big Mountain did you develop or arrive at a theory of the reason for the crash of Herb Haley's airplane?

Mr. Talbot: Objection, your Honor.

The Court: Just a minute. Counsel has the [213] right to finish his questions.

Mr. Talbot: I'm sorry, your Honor.

The Court: And did you get the entire question?

(Thereupon, the reporter read back Question, Line 21, Page 213.)

The Court: Objection?

Mr. Talbot: I do, yes, sir.

The Court: Well, I think the objection is good.

Mr. Nesbett: I thought I qualified the man as an experienced bush pilot and having 300 hours.

The Court: Well, it may be true that he's an experienced bush pilot—he may have a lot of experience but I don't know whether anybody can go

(Testimony of Graham Mauer.)

out and look at a plane and then come to some conclusion as to why it crashed. There's a thousand reasons can cause a plane to crash.

Mr. Nesbett: That's certainly true, your Honor, that's certainly true. All we can do is the best we can under the circumstances. We've not got Haley here. I'm just trying to offer the best I can from a witness.

The Court: Well, you're done your duty. I'll do mine. Objection sustained.

Mr. Nesbett: I believe that is all, your Honor.

GRAHAM MAUER

testifies as follows on: [214]

Cross-Examination

By Mr. Talbot:

Q. Mr. Mauer, as I understand your testimony you, as chief pilot for Cordova Airlines, went down on the 19th of December at Big Mountain to represent the company and to protect the company, right?

A. Not entirely. That was one of the reasons for going down.

Q. Now, to whom did you give your written report of your investigation?

A. It was turned over to Mr. Smith of Cordova Airlines who in turn submitted it to the Civil Aeronautics Board.

Q. I would, your Honor, call upon Mr. Nesbett to produce that written report which was submitted

(Testimony of Graham Mauer.)

by this man to his company as a result of this trip. I realize it's very short notice but I'd no idea there was such a document until just now.

The Court: Well, you could have obtained the information by discovery proceedings and you could have probably obtained copies of the report.

Mr. Nesbett: We spent hours, your Honor, trying to get what he wanted; that wasn't among the requests.

The Court: Do you have the report with you?

Mr. Nesbett: I have not, your Honor, no, sir.

Q. (By Mr. Talbot): Now, I take it that you observed carefully the scene of this crash, Mr. [215] Mauer?

A. I spent approximately 5 hours at the scene.

Q. Going over the ground? A. Yes, sir.

Q. You have testified, I believe, as to skid marks that this airplane made when it hit the ground first and then——

A. Nobody asked me about skid marks, but there were impact and skid marks, yes, sir.

Q. Now, isn't it true that part of the impact marks consisted of deep gouges in the terrain made at right angles to the path of the aircraft such as would have been made by the propeller of the aircraft?

A. That's part of the skid marks, yes, sir.

Q. And you observed propeller marks?

A. I did.

Q. By observing those propeller marks and the

(Testimony of Graham Mauer.)

depth of them you could tell, could you not, that the plane was under power when it crashed?

A. No, sir, you could not. The ground was frozen extremely hard and extremely rocky.

Q. Hard and rocky ground? A. Yes, sir.

Q. Would a propeller that was still in the air or that was only windmilling have made the depressions and gouges that you observed, sir? [216]

A. Possibly it could have. At half power possibly it would have.

Q. Half power?

A. That's right. It doesn't necessarily have to be—you stated that the aircraft was under considerable power. The marks could have been made by an aircraft with the engine only at 50 per cent power.

Q. Very well. Now you have been present—you were present in court when Mr. Evans testified, were you not? A. Yes, sir.

Q. You heard his testimony? A. Yes.

Q. You realize that your testimony about 8 cases of dynamite is in sharp conflict with his testimony of 16 cases? A. I do.

Q. Now, is it your testimony that George Clark, the CAB investigator, agreed with you on the scene that there were 8 cases of dynamite?

A. He did not agree with me. I didn't state that.

Q. I must have been mistaken. Now, did you make a careful examination of this wreck and the surrounding area to ascertain other items which

(Testimony of Graham Mauer.)

may or may not have been laden on board this aircraft? A. Yes, I did.

Q. And what other items did you see or find as a result of [217] this careful examination?

A. There was no personal items as mentioned by Mr. Evans. Apparently those had all been removed when we got there. I retract that statement —the gun that Mr. Evans stated was there in a damaged condition and there was the 2 skis lying around the 2 broken off skis. One of the landing gear, one of the wheels, the engine was laying there. One blade of the prop was considerable distance from the aircraft and one of the seats was out of the aircraft. The pilot's seat was out of the aircraft and numerous bits of upholstery and various parts of the aircraft itself was scattered over a wide area.

Q. Was there any cargo remaining in the aircraft? A. Yes, there was.

Q. And what did that consist of?

A. There was a partial box of dynamite. When I say a partial box, there was a partial carton with several broken pieces of dynamite in the aircraft and it was in a charred condition.

Q. Was there anything else in the aircraft in the way of cargo or possible cargo?

A. No, sir.

Q. And you are quite certain that 8 cases of dynamite is all that was reflected by the fragments of the boxes as far as—— [218]

A. As near as I could reconstruct, yes, sir.

(Testimony of Graham Mauer.)

Mr. Talbot: May I have Exhibit M, please?

The Court: This is M here.

Q. Now, this is a disturbing problem, Mr. Mauer. Now we have some testimony in this case that—in fact I think it's all approximately stipulated—anyway, there is testimony that these cases of dynamite weighed 53 pounds each. Now taking your figure of 8 cases and multiplying it by 53 I get a total of 424 pounds. But we have on Exhibit M, the flight report for the 18th, under "Pounds Freight," an entry apparently made by the pilot—not 424 pounds, but 870 pounds.

Mr. Nesbett: I will object to——

Mr. Talbot: I haven't finished my question, your Honor.

The Court: I think he's entitled to finish the question.

Q. (By Mr. Talbot): Now——

The Court: Just a minute. Will you start all over again?

Mr. Talbot: Yes, your Honor.

Q. Mr. Mauer, according to my calculations 8 cases of dynamite weighed 424 pounds but we have some evidence here which possibly indicates that the pilot was [219] carrying 870 pounds instead of 424. Now does looking at this document or thinking about that other evidence, does that change your testimony in any way?

A. No; other than that can be interpreted 2 ways if you will look at it very carefully.

(Testimony of Graham Mauer.)

Q. Well, I suppose that will be a matter for the jury, your Honor.

The Court: Well, I'd like to know how it can be interpreted another way.

Q. Yes, I would, too.

A. In looking this over very carefully, he states that there is 870 pounds. By looking at it, it looks like 570 pounds. I mean it could be interpreted, and I think——

The Court: You mean to say that——

A. Look at that, sir. (The exhibit was handed to the Court.)

The Court: You mean to say that this could be read "570" or "870" pounds?

A. It could be read either way, yes, sir.

Q. (By Mr. Talbot): Now, Mr. Mauer, do you have before you the other exhibit which is the log for the 17th?

A. Yes, sir, I do. That is Exhibit K?

Q. Yes. A. Yes. [220]

Q. Now, do you see the entry called "Total Fuel on Board" at the top of the page?

A. I see a column that says "Total Aboard," yes.

Q. "Total Aboard." That's under "Fuel," isn't it? A. Yes, under a sub-title.

Q. And the number is 55?

A. That is written above the column heading.

Q. That is within the column, isn't it, under "Total Aboard"?

A. No, sir; it's written above.

(Testimony of Graham Mauer.)

Q. Well, I'm sorry. I've got a copy and you have got the original. I apologize. May I see that? (Short pause.) You are absolutely right.

The Court: May I have that other exhibit?

A. This one, sir? (The exhibit was handed to the Court.)

Q. (By Mr. Talbot): Anyway, we can agree it's in the column called "Total Aboard" or above it?

A. It's above the column "Total Aboard," yes, sir.

Q. Now down below that in the other column called the "Amount Added," is there a figure?

A. Yes, sir.

Q. And what's that?

A. It says "35" here.

Q. And now assuming, Mr. Mauer, that the 55 means total aboard at the beginning of the day it's true, is it not, [221] that the pilot would have to burn 35 gallons before he could put 35 more in?

A. If that were the total aboard at the beginning of the day and flew so much time there, he would have to fly so much time before he could add 35 gallons, that is true.

Q. Now, how many hours and minutes does that log show he flew on the 17th?

A. This shows 2 hours and 50 minutes.

Q. You're an experienced Cessna pilot, sir? Cessna 180? Could you tell us approximately how much a Cessna 180 with a pilot, no passengers,

(Testimony of Graham Mauer.)

and no freight—how much it burns an hour, gasoline under normal operating conditions?

A. 12 gallons an hour.

Q. How about fully loaded? That is, gross loaded but not overloaded?

A. Under normal operation he would not burn any more than 12 gallons per hour.

Mr. Talbot: No further questions.

GRAHAM MAUER

testifies as follows on:

Redirect Examination

By Mr. Nesbett:

Q. Mr. Mauer—— [222]

The Court: Before you continue, you might want to ask some questions. I am going to make a ruling. I have refused to allow Exhibit H in evidence. That is the flight reports of days previous to the day in which the plane was destroyed. I am going to change my ruling and allow it to be introduced in evidence for a limited purpose only, and I am going to do that because the testimony of the Plaintiff's witness. Plaintiff testified that the—on Exhibit M which is in evidence there is a figure that could be read either 870 or 570. I am going to allow Exhibit H to be introduced into evidence so that the jury can have a chance to compare the figure 8 and the figure 5 in Exhibit H with the figure 8 or the figure 5 in Exhibit M. Now I might

(Testimony of Graham Mauer.)

say, ladies and gentlemen of the jury, that this exhibit is only admitted for this limited purpose and I am admitting it because the testimony of this witness is that he could read it 2 ways and I agree with him. I agree it could be read either 870 or 570, and I think that in order to determine whether or not it's 870 or 570 you should have a chance to compare the figure 8 and the figure 5 in the other reports that were made relative to the flight of the Cordova Airlines by Pilot Haley. So it may be admitted only for that limited purpose.

Mr. Talbot: Thank you, your Honor. I have no further questions. [223]

GRAHAM MAUER

testifies as follows on:

Further Redirect Examination

By Mr. Nesbett:

Q. Mr. Mauer, did you disagree with Mr. Clark as to the number of cases of dynamite on board?

A. No; I did not disagree with him.

Q. You testified I believe on cross that you did not—you testified that you had agreed with him. Will you explain your answer?

A. My answer to that is Mr. Clark came up and asked me how many cases I figured he had on board and I said, "Well, as near as I can figure from what we have seen here is around 8 cases," and I asked him what he thought and he says,

(Testimony of Graham Mauer.)

"Well, now, that's my thinking, too." So I did not disagree with him.

Q. Then did you go over the scene in the area of the accident with Mr. Clark or were you there when he went over?

A. I was there. I mean we did not work side by side, Mr. Nesbett. He was going over the area, I was going over the area, Mr. Rogers was there and Mr. Tibbs. We were all going over the area at the same time and when we would run into something interesting, for instance the engine, why we would all congregate around and take a look at the engine and discuss it. [224]

Q. Now, Mr. Mauer, as a result of your investigation at the scene and knowledge later obtained, do you know whether or not one front seat and the two rear seats of that airplane were in the airplane at the time it crashed?

A. I did not see them in the aircraft. And we did bring the hammock seat—in other words, the hammock seat and the other front seat was at the camp. Now they were not in the aircraft when I saw the aircraft; neither was the pilot's seat. It was laying outside the aircraft.

Q. But I asked you about the seat in front other than the pilot's seat and the two rear seats. Is it a fact that those three seats were at the camp?

A. Not the three seats. The hammock seat and the other front seat was at the camp.

Q. Were at the camp? A. Yes.

Q. And Cordova Airlines did regain or have pos-

(Testimony of Graham Mauer.)

session of those, did they not? A. Yes.

Q. Were they damaged in any fashion?

A. No, sir.

Q. Did you have occasion during your investigation to observe the skis of that airplane or what was left of the skis of the airplane? [225]

A. Yes, sir, we looked those over very, very carefully.

Q. I'll ask you whether or not you observed whether there was a coating or covering of galvanized tin or metal over those skis when you saw them at the scene of the wreck?

A. No, sir, there was not.

Q. Were the skis so badly mangled that you wouldn't have been able to observe the tin if they had been on the skis prior to the crash?

A. No, sir. One ski was practically intact, the largest portion of the ski was practically intact. In other words, the full length of the ski. The other one was sort of rolled up in a ball but the entire bottom of the ski was there for both skis. And there was no indication of any steel on them, just the aluminum.

Mr. Nesbett: I believe that is all, your Honor.

Mr. Talbot: No questions.

The Court: Step down.

(Thereupon, the witness retired from the stand.)

Mr. Nesbett: Call Mr. Seltenreich.

BUD S. SELTENREICH

called as a witness in rebuttal for and on behalf of the Plaintiffs and being first duly sworn upon oath testifies as follows on [226]

Direct Examination

By Mr. Nesbett:

Q. Is your name Bud S. Seltenreich?

A. Yes.

Q. Are you employed by the Civil Aeronautics Authority? A. Yes.

Deputy Clerk: Mr. Nesbett, would you let him spell that name, please?

A. S-e-l-t-e-n-r-e-i-c-h.

Q. You are employed by Civil Aeronautics Authority in Anchorage, are you not?

A. Yes.

Q. What is your official position, Mr. Seltenreich?

A. Chief of the Air Carrier Safety Maintenance Branch.

Q. Mr. Seltenreich, did you have occasion to discuss with me in your office this morning Civil Air Regulation 49.3, sub (b)? A. Yes.

Q. I hand you a paper and ask you if that actually is your document that you gave to me this morning? A. Yes.

Q. Does that document set out Civil Air Regulation 49.3(b)? A. Yes.

Q. Has 49.3(b) been amended in any fashion and, if so, what were the dates?

(Testimony of Bud S. Seltenreich.)

A. I believe it has been, part of it has been amended, although I would have to study the amendment to determine [227] for sure if this particular section had been amended.

Q. Didn't you state this morning that there was an amendment that was in the same pamphlet you gave me?

A. Yes, but I wasn't certain whether it applied to this particular part, (b) of 49.3.

Q. Mr. Seltenreich, generally what does 49.3(b) concern?

Mr. Talbot: Objection. The regulation speaks for itself.

The Court: Well, if that is typical of a Government regulation somebody has to explain it because I have read Government regulations from time immemorial and I can't understand them. Overruled.

Q. Generally, what does that regulation concern itself with? The subject matter?

A. It pertains to the regulations for transportation of explosives and other dangerous articles by air.

Q. Does it particularly provide in connection with obtaining a shipper's certificate when explosives are received for shipment by an air carrier?

A. Section 49.3(b) of Civil Air Regulation, part 49 provides for the shipper to provide a certificate of what the shipment contains.

Q. Now, Mr. Seltenreich, I am not asking you to interpret the meaning of that regulation. I will

(Testimony of Bud S. Seltenreich.)

ask you as Safety Agent how—what practical steps the Civil Aeronautics Authority takes in Alaska to enforce that [228] regulation as to air carriers?

Mr. Talbot: Object, your Honor, I don't think any foundation has been laid that they have authority. I understand that this is a CAB regulation and I'm not up on exact interrelationships here, but——

The Court: Overruled. One of the questions here is whether or not they had to get a waiver and I think this is pertinent to that question.

A. Would you state the question?

Q. (By Mr. Nesbett): As a practical matter, what enforcement procedures were followed with respect to that section? Was it enforced? Were any enforcement steps set out?

A. In this particular case I don't know, because I had no dealings with this particular operation.

The Court: Well, that's not the question. The question was "generally," not this particular case, but as a general thing?

A. It's a little difficult to answer. We usually——

The Court: Well, now, if you don't know there's no disgrace in saying you don't know.

Q. Do you know?

The Court: We don't want you to guess and we don't want you to say "usually."

A. Well, no, I don't know. [229]

Q. Didn't you tell me that in your office this morning? A. That's right.

Mr. Nesbett: I believe that's all.

Mr. Talbot: No questions.

The Court: May this witness be excused?

Mr. Talbot: He may.

The Court: Do you want 49.3 in evidence?

Mr. Nesbett: Your Honor, it might be helpful. May I use that and put it in evidence and get a copy for you, sir?

A. Yes.

Deputy Clerk: Plaintiffs 2.

The Court: It may be received in evidence. Yes, that's Plaintiffs Exhibit 2. And when we are talking about documents, Mr. Nesbett, have you introduced the Civil Aeronautics Board S-712?

Mr. Talbot: Yes, your Honor.

Mr. Nesbett: Yes, your Honor, that is in evidence.

The Court: What is the number of that exhibit?

Mr. Nesbett: It's Plaintiffs Exhibit A.

Mr. Talbot: 1, I think.

Deputy Clerk: Plaintiffs 1.

Mr. Nesbett: Your Honor, actually that, of course, was offered at a pretrial conference, Mr. Talbot.

Deputy Clerk: That's right. [230]

Mr. Nesbett: Does your Honor recall?

The Court: Yes, it's been marked in this case though. I want to be sure it's in evidence.

Deputy Clerk: Wait a minute—Plaintiff's 1 is the face sheet.

Mr. Talbot: I am in error, your Honor. It's Defendants A.

The Court: Oh, Defendants A. And 49.3(b) is Plaintiffs. That is Exhibit 2.

Deputy Clerk: 2.

Mr. Talbot: Your Honor, I'm awfully close to resting. May we have a short recess?

The Court: Yes. Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone. You are not allowed to discuss it, let them discuss it with you, not until the rights of the parties are finally submitted to you for your decision.

May I inquire if you rest? Will you have any other testimony?

Mr. Talbot: No, your Honor.

The Court: Well, I want—if you are going to rest will you let me know, because I want to discuss instructions with you before the jury comes down?

Mr. Nesbett: Yes, your Honor. [231]

The Court: And if you have to have any more testimony we'll have to bring the jury down and get the testimony and excuse them again because there's some of the instructions that have to be clarified. Court will now stand in recess until 15 minutes to 3:00.

(Thereupon, at 2:45 o'clock p.m., June 3, 1958, court reconvenes following a 10-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated the jury is in the box?

Mr. Nesbett: Yes.

The Court: You may proceed.

Mr. Nesbett: Your Honor, I want to call Mr. Smith.

MERLE K. SMITH

resumes the witness stand in rebuttal and testifies as follows on:

Direct Examination

By Mr. Nesbett:

Q. Mr. Smith, did Cordova Airlines make any application to the Civil Aeronautics Authority for any specific waiver to carry the dynamite that was on the airplane on December 18, 1955?

A. We did not. We didn't need—— [232]

The Court: Just a minute. The answer is you did not?

Mr. Nesbett: ——

The Court: Don't try to explain.

Q. Mr. Smith, will you state why you made no specific application for a waiver to Civil Aeronautics Administration?

Mr. Talbot: I object, your Honor, on the ground the regulation requirement for waiver is clear, and question of why they didn't do it is absolutely irrelevant.

The Court: Well, it's sustained unless you can show that the witness was told by somebody in authority they didn't have to make an application. Now if you have got that testimony I will over-

(Testimony of Merle K. Smith.)

rule the objection. Otherwise I am going to sustain it.

Q. (By Mr. Nesbett): Mr. Smith, were you advised by local officials of Civil Aeronautics Authority that you had blanket authority to carry explosives for the Air Force? A. I was.

Q. And by whom? A. Mr. Tibbs.

Q. And who is Mr. Tibbs?

A. He was our agent, CAA agent in charge of Cordova Airlines.

Q. And where was his office?

The Court: Just a minute. You mean to say one of [233] your employees told you that?

A. This was a CAA—the agent in charge of Cordova Airlines, who was a CAA man and he looks after all of our operations.

The Court: Then you were told by someone in your employ? You weren't told by a Governmental employee?

A. Yes, he was Government employee.

The Court: He had a dual capacity?

Mr. Nesbett: Mr. Smith, will you explain to the Court how that operates as to scheduled airlines and assignment of CAA officials?

A. The CAA sets up for scheduled airlines—they have an agent in charge who is usually a pilot and he is in charge of everything in regards to our relations with CAA. We deal with him on everything. Then they have another inspector, as we call them, who is the maintenance inspector who is in charge of all the maintenance. He deals with the

(Testimony of Merle K. Smith.)

Company as far as mechanics and maintenance of the aircraft.

Q. What relationship did Mr. Tibbs have with Cordova Airlines insofar as CAA was concerned?

A. He was the agent in charge, the one we dealt with.

Q. Now, was Mr. Tibbs paid by Cordova Airlines in any fashion? A. No, sir.

Q. Did Mr. Tibbs maintain his office at Cordova Airlines building or property? [234]

A. No, sir.

Q. Where did he maintain his office?

A. In the Terminal, at the International Airport at that time.

The Court: He was an employee of whom?

A. Civil Aeronautics Authority.

The Court: All right.

Q. Now, Mr. Smith, has Cordova Airlines been charged with any violations of the law or regulations as a result of this accident of December 18th?

A. No, sir. Not either by the CAA or CAB.

Mr. Nesbett: I believe that is all.

MERLE K. SMITH

testifies as follows on:

Cross-Examination

By Mr. Talbot:

Q. When did you make this inquiry to Mr. Tibbs?

A. Oh, I think that we had been talking about this regulation coming out for——

(Testimony of Merle K. Smith.)

The Court: May I ask you a question? Then you knew before the accident that your planes were carrying dynamite, is that right?

A. Not on this particular flight, I didn't know he was carrying dynamite on this flight.

The Court: Well, I know, but your planes had been [235] in the habit of carrying dynamite? Otherwise you wouldn't have discussed this problem, is that right?

A. Well, we assumed—our position was that the order come out December 2nd, give us a blanket authority.

The Court: Well, I know, but you did have some knowledge that your planes might or had been carrying dynamite?

A. It was—from my position, MK wanted to carry dynamite it would be all right because we were protected.

Q. (By Mr. Nesbett): Mr. Smith, how did you learn about the existence of this order of December 2, 1955? This order from CAB?

A. Our counsel in Washington, D. C. I believe he wired us and told us that there was an order coming out.

Q. And you had—Cordova Airlines had in the past carried dynamite all right, had it not?

A. Yes, sir.

Q. And for mining operations?

A. Yes; small amount.

Q. Mining operations on bush planes?

A. That's right.

(Testimony of Merle K. Smith.)

Q. Had you received any advice from Mr. Tibbs with respect to the legality of carrying dynamite in those operations?

A. We were, if it was under 60 per cent we'd treat it like we would gasoline or anything; you couldn't haul passengers.

Q. And who told you that? [236]

A. Well, Mr. Tibbs or his predecessor.

Q. Who was Mr. Tibbs' predecessor?

A. Offhand, I just can't recall his name.

Q. In any event, take the period for two months prior to December of 1955. Had Cordova Airlines had any occasion to carry any dynamite preceding that two months' period?

A. That I don't remember.

Q. If you—did you carry it on any of your large planes? Could you isolate it to that situation?

A. I don't think we did, no. No large loads.

Q. Did you know when Haley went to the Iliamna area that part of his duties would be to carry dynamite? A. I didn't know it, no.

The Court: Well, you knew that his duty was to carry anything Knudsen wanted him to carry?

A. That's right.

Q. Mr. Smith, where is Mr. Tibbs now?

A. He has been advanced in capacity with the CAA and he has moved down to the Federal Building, that's in the building here.

Q. His office is in this building now?

A. Yes.

(Testimony of Merle K. Smith.)

Q. And he is still working right in this building today?

A. I don't think so. I think he's on vacation or to a flight training school at Oklahoma City. [237]

Q. Well, do you know where he is?

A. Well, I don't exactly know.

Q. Now, is it your position that prior to the promulgation of this order No. S-712, that is the regulation that was made for the benefit of the Air Force, that prior to that order you were free to carry dynamite as long as you didn't carry it on a plane that also carried passengers at the same time?

A. I'm not familiar with that order number. Is that one dated December 2d?

Q. Yes, sir.

A. Well, yes. If it wasn't—if it was under 60 percent, was a Class B explosive.

Q. It was your understanding that anything under 60 percent was Class B and you could carry it as ordinary freight, is that right, as long as there were no passengers aboard?

A. That is right.

Q. To your knowledge, did Cordova Airlines ever apply to CAA for permission for a waiver on a particular flight for the carriage of explosives?

A. Yes.

Q. You did get waivers for particular flights?

A. Since the order of May—I believe it was in May—came out we have been getting waivers, May of 1956 I believe [238] it was.

(Testimony of Merle K. Smith.)

Q. Now, the order of May, in May 1956, that was the order that was secured by Morrison-Knudsen after this crash, isn't that right?

A. Well, I was told the Air Force.

Q. And that regulation in May of 1956 required you to get special permit for each flight, right?

A. Well, I don't know whether it required it, but we did it.

Q. You have been getting permits regularly for each flight, then?

A. Since last order come out, yes.

Q. How many of those special permits have you gotten?

A. I can't recall. There's been several.

Q. Do you have any of those special permits or waivers available to the Court?

A. They're pretty sure they're in our files.

Q. Where, in Cordova?

A. No. No, they're at the airport—International Airport.

Mr. Talbot: No further questions.

The Court: Any other questions?

Mr. Nesbett: I have no questions, your Honor. I was looking for Mr. Seltenreich.

The Court: You may step down.

(Thereupon, the witness retired from the stand.)

The Court: Any other testimony?

Mr. Nesbett: No, your Honor. Plaintiff [239] rests.

Mr. Talbot: Defense rests, your Honor.

The Court: Ladies and gentlemen of the jury, I want to discuss instructions with the counsel prior to the argument and I am going to ask you to return to the jury room until you have been called back into the court room. Will you kindly retire as quietly as possible.

(Thereupon the jury was excused and left the courtroom and the following proceedings were had:)

The Court: We will proceed with Plaintiffs proposed instructions first and will you kindly get out Plaintiffs proposed instructions. I have instruction No. 1 and I object to the last paragraph. That is found on page 2, and I propose to strike out the last paragraph. I don't think the question of due diligence has anything to do with this case at all. There's no evidence here that there was or was not due diligence. All we know is the plane crashed. So I am proposed to strike out the last paragraph on page 2 of the first instruction. I have no objection to Instruction No. 2. Does the Defendant have any objection?

Mr. Talbot: Yes, we have some more objections to 1.

The Court: All right, what have you to 1? I didn't want to foreclose you; I want you to have a chance to make your record.

Mr. Talbot: On the first page of [240] Plaintiffs proposed instruction No. 1, the paragraph that

begins "In connection with this defense you are instructed that you must also consider——"

The Court: Well, I think I'll strike that out, too, because I don't think there's any evidence here of due diligence. I don't think that has anything to do with the issues in this case so I'll strike out, beginning with "In connection" and all that paragraph and then the subdivision marked "3."

Mr. Talbot: Now,——

Mr. Nesbett: Your Honor, before I pass up any privileges, is this the point to argue our points and——

The Court: All right. Have you got anything to say? It's already been argued. You presented to me the other day and we argued as to questions of due diligence and you presented your theory. I may not agree with your theory, but you go ahead. What's your theory now?

Mr. Nesbett: The result of striking the instruction with respect to that clause of the policy is to ignore Clause 3 of the policy. What was the reason for inserting Clause 3 of the policy referring to Clause 2 unless it was to modify or amplify Clause 2? Therefore, if you strike that Clause 3 you are in effect telling the jury that all they have to find is "whether or not the aircraft was operated in accordance with its operations limitations or not," the inference being that if [241] it was not operated in accordance with its Operations Limitations, the policy does not apply or cover. Now, your Honor, if the parties had intended that in the original insurance contract they could have

said it. Now that same clause of course was cited in the Ninth Circuit case that I have referred your Honor to. I know your Honor has read it so I am not going to belabor that point, but the effect of it is to make what is listed as a general condition in the policy, to make that an exclusion. If they would have wanted an exclusion they would have put it in the exclusions. Instead they moved it down to the general conditions and set it out as Clause 2 and modified it with Clause 3. What was the reason for Clause 3 unless it was to be considered in connection with Clause 2 which it mentions?

The Court: All right, I'll strike out the paragraph in Clause 3. Any other objections to——

Mr. Talbot: Yes, your Honor. The third line from the bottom of page 1, the word "not" should be inserted after the word "have."

The Court: Well, I—it's evidently inserted in my copy. It says, "If you find that the Defendants have not proven * * *" It's already inserted in this. I supposed it was inserted in the copy; I don't know.

Mr. Talbot: No, it wasn't. Now, on page 2——

Mr. Nesbett: Pardon me. Your Honor, what was your [242] ruling on my——

The Court: Well, you have inserted, the third line from the bottom, you have inserted the word "not" after "have." At least I assume you have, because it was there when I got the instructions from you.

Mr. Nesbett: Oh, yes, sir, but I was wondering what your ruling was with respect to leaving in

the portion of the instruction dealing with Clause 3?

The Court: Oh, I struck it out, didn't you hear?

Mr. Nesbett: It's removed?

The Court: My ruling stands. I'll strike out——

Mr. Talbot: Your Honor, on page 2, the entire first sentence, the gist of it is and the burden of it is, that we have to show that the crash was caused by the overloading. Now, that is contrary to my understanding, interpretation of this policy.

The Court: Well, the first sentence refers to paragraph 3. I have stricken out paragraph 3 and I'll strike out the first sentence. However, I'll leave in the last sentence in which case, "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the Plaintiff on this defense." And I think that is a proper statement.

Mr. Talbot: No, your Honor, because [243] that would require us to prove what caused this crash —and this is the Bruce case—this is the question of whether or not the parachutes, the absence of the parachutes contributed to the crash and the Bruce case is right in point and it says,"if you violated the regulations and if the violation of regulations was prohibited by the policy they, the insurance company, need not show any cause or relationship between the violation of the regulations and the crash.

The Court: I will leave that paragraph in.

Mr. Talbot: All right.

The Court: And I have stricken out the last paragraph. Now we come to proposed Instruction No. 2. Do you have any objection to proposed Instruction No. 2?

Mr. Talbot: Yes, your Honor. I think that the words "purpose"—that the word "purpose" and the word "use" do not require definition. They're plain, ordinary, understandable words and I think that the definitions might tend to confuse the jury.

The Court: Well, I will overrule your objection. On the second page is the next to the last paragraph after the word "consent" on the third line I have stricken out "of responsible officials." I think that is a question of fact for the jury to determine whether or not the airplane company had knowledge and they may have knowledge even though an official doesn't have knowledge. Otherwise I think the rest [244] of the instruction is good.

Mr. Talbot: Your Honor, I object to the first paragraph on page 2 of Instruction No. 2, the paragraph that reads, "If you find that the defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose, then you must find for the plaintiff on this defense." I urge upon the court that whether or not this was an unlawful use is a question of law for the court and not a question of fact for the jury.

The Court: I will overrule the objection. That

is one of the questions for the jury to determine whether it was an unlawful purpose or unlawful use. Have you any objections to Plaintiffs Instruction 3?

Mr. Talbot: Yes, your Honor. The policy immediately—strike that. The paragraph immediately after the quotations and regulations which begins, "In this connection the plaintiff contends that Civil Aeronautics Board Order S-712" covers the flight in question. I say, your Honor, that it's clear from a reading of that regulation and matter of law that that regulation had nothing whatever to do with this flight and there is no evidence. For example, that regulation provides that the United States Air Force may ship certain classified explosives from Tucson, Arizona in aircrafts specifically chartered by the Air Force for that purpose and there's nothing [245] in this case that would bring it within the terms of Order No. S-712.

The Court: May I see Order S-712? That's Exhibit A. May I see Exhibit A? (The exhibit was handed to the Court.) Well, it is true that in the beginning preamble it says "Tucson, Arizona" but the Order doesn't say Tucson, the Order doesn't restrict it to Tucson. If it does I can't find it.

Mr. Talbot: It doesn't say Tucson in the body of the Order but reading the regulation as a whole and especially the part "plane especially chartered by the Air Force."

The Court: I'm sorry, but it's the Order that counts and not the preamble that goes before, so I will overrule your objection. Any other objections to 3?

Mr. Talbot: Yes, your Honor. We object to the last 2 paragraphs. Mr. Nesbett would have the burden cast upon us to prove that.

The Court: Well, I think the burden is upon you. You are the one that is raising this defense. The burden is upon you.

Mr. Talbot: But we don't—only an insane man, and I may be one, your Honor—but only an insane man would claim that we have got the burden of proving Haley crashed for want of a piece of [246] paper.

The Court: You are raising the exceptions and it's your defense and the burden of proof is upon the party who presents the issue, and you are presenting the issue here.

Mr. Talbot: Well, the policy said they had to get a waiver and they didn't get it and I think we proved that, but we don't have to go on and prove for the want of a piece of paper in the home office this plane crashed.

The Court: Well, I think that's a question for the jury. I might feel that whether you did or didn't have authority had nothing to do with the crash. I don't think the fact that they had authority or didn't have authority had anything to do with the crash at all.

Mr. Talbot: I agree with your Honor, absolutely.

The Court: I will overrule your objection. And you also object to the last paragraph on the page?

Mr. Talbot: Yes, your Honor.

The Court: Well, I will overrule the objection to that unless you have got some good reasons.

Mr. Talbot: Well, that's the same argument. We're not prepared to show that lack of a writing from Farwest General Agency caused this crash.

The Court: All right. I'll overrule your objection. Now we will consider Defendants proposed instrustions, and Instruction No. 1—I have modified it and I will give you the modifications before we discuss any objections. On the [247] bottom of the page, page 1, that after the word "destroyed" I think should be put in "provided you find a waiver was necessary:"

Mr. Nesbett: The bottom of page 1, your Honor?

The Court: Yes, after the word "destroyed," I think ought to be put in "provided you find a waiver was necessary." Then on page 2, on line 2 after the word "authority" should also put in the words, "and find that a waiver was necessary." I think an issue here is whether or not a waiver was necessary.

Mr. Talbot: I'm sorry, your Honor——

The Court: Page 2, after the word "authority" * * * "and find that a waiver was necessary." Then at the bottom of the page beginning with the paragraph "Concerning the knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question, is a question of fact for you to determine." That I have stricken out "If you find that dynamite was in fact carried, you are instructed that," and then, "ordinarily"—I have in-

serted the word "ordinarily" in next to the last line, "the knowledge and consent of an agent is attributable to and is legally binding upon the principal." Now I suppose that same rule will apply to a master and servant, that if the servant has knowledge, then the knowledge is imputed to the master. And then I have struck out the rest of the instruction. That is all of the instruction on [248] page 3. Now, Mr. Nesbett, if you want to——

Mr. Nesbett: That's line where—from which words, your Honor, after "Cordova Airlines"?

The Court: Well, everything after the word "upon" on line 2 and I inserted the word "principal," period.

Mr. Nesbett: And the last line on page 2 would read, "attributable to and is legally binding upon the principal"?

The Court: "Upon the principal."

Mr. Nesbett: And the rest of the instruction is stricken?

The Court: And the rest of the instruction is stricken. Now I might ask the Defendant if he wants to argue about the striking of this instruction? I'm trying to avoid trying to give to the jury any impression as to a finding as to the facts and I think that the instruction is struck which could be construed that I am telling the jury what the facts are.

Mr. Talbot: It involves the question of whether or not as a matter of law this was an unlawful purpose from the undisputed facts. I think your Honor has ruled upon that.

The Court: Now, I find no objection to Instruction No. 2. Mr. Nesbett, do you have any objections?

Mr. Nesbett: I see no purpose, your Honor, in line——

The Court: On what?

Mr. Nesbett: Line 10, the instruction that "it being [249] a criminal offense for any person knowingly to violate the provisions of a regulation" having no application to this particular case whatsoever.

The Court: Well, I will overrule the objection because you have asked Mr. Smith if he had ever been prosecuted and he said no.

Mr. Nesbett: Very well.

The Court: Or any Complaint had been filed. I propose to strike out entire Instruction No. 3. You know we haven't had any testimony at all about the Farwest General Agency.

Mr. Talbot: Well, it's in the policy, your Honor. It's provision is in the policy on which the action is based. It states that Farwest General Agency is the agent of the insured, gives their address and all. I don't think we need any testimony about them.

The Court: Where is it in the policy?

Mr. Talbot: That's General Exclusions, 1 (c).

The Court: May I have the Exclusions, then?

(The document was handed to the Court.)

Mr. Talbot: And the other side of the sheet, your Honor, makes clear who Farwest Agency is at the top. In fact, they executed this certificate of

insurance itself as agent for Lloyd's, Underwriters, at Lloyd's, London.

The Court: Mr. Nesbett, what have you got to say?

Mr. Nesbett: Well, your Honor, that goes into the [250] very clause that is covered in Instruction No. 2, I believe, of mine. If I remember, it commences under the General Exclusions, the certificate and/or policy does not cover and then, number one: "Any loss, damage or liability arising from" and then we skip down to "or any flying in which a waiver issued by the CAA is required unless with the express written consent of Farwest." Now I see no objection to inserting "Farwest" somewhere in the other instructions at the appropriate point if Mr. Talbot considers it necessary, but to separate an instruction such as this is written ignores absolutely the wording of the exclusion that it does not cover what the damage or loss must arise from; the policy specifically says so. This instruction wouldn't conform to the law of the case as apparently your Honor conceives it at all.

The Court: Well, do you contend that the failure to notify Farwest General Agency is something that arose from the loss of the plane? In other words, the fact that you did or didn't give notice to the agency, does that mean that the loss of the plane arose from the lack of knowledge?

Mr. Talbot: Yes, sir, if they had requested permission from Farwest General Agency in accordance with this policy this flight would never have taken place; I'm convinced of that.

Mr. Nesbett: Well, that's personal opinion. I submit we have to go by the wording of the contract itself. My [251] interpretation of it is that—well, the policy specifically says, "any damage," your Honor, in paragraph 1 of Exclusion, first line: "Any loss, damage or liability arising from," meaning growing out of, or as a result of. Then skip down to the bottom of (c), "any flying in which a waiver issued by the CAA is required unless the Farwest Agency agrees."

The Court: Well, I am going to refuse to give Instruction No. 2. Instruction No. 4—I don't like these instructions that say, "Then your verdict must be for the Defendants and against the Plaintiffs" because you cannot get all the instructions in one instruction and here's just one issue that is presented and then I say to the jury, "Well, now, if you find on that one issue alone, then you have to find so and so."

Mr. Talbot: Well, we submit——

The Court: If you say, "must be for the Defendants and against the Plaintiffs 'on this issue'" it may be different.

Mr. Talbot: Well, your Honor, we pleaded this as a separate complete affirmative defense and if we prevail on this one issue that is the end of the lawsuit and that's why the instruction is worded that way.

Mr. Nesbett: Your Honor, as it terminates there it's thoroughly inconsistent with the previous instruction you approved, because it says in effect if the jury finds it's overloaded in violation of the

approved operations and [252] limitations then you must find for Lloyd's. That isn't the case. If the jury finds that it was overloaded they must next then find that the overload caused the crash. Then they can find for the Defendants and that I believe is one of the instructions you approved.

The Court: Well, don't you think it would be cured if we inserted the words, after "Plaintiffs," "on this issue"? Here's an issue here I think that the jury is going to have to find whether or not at the time the plane crashed it was overloaded and it was in violation of operation limitations or CAA Approved Operations Manual.

Mr. Nesbett: And that by reason——

The Court: Pardon?

Mr. Nesbett: And that by reason of the overload the plane did crash. Is that what you propose to add?

The Court: No, I just say, "upon this issue"; that is upon the overloading issue.

Mr. Nesbett: Then the wording is—the last sentence would read, "If you find that at the time it crashed the aircraft was overloaded, in violation of its Operations Limitations or CAA Approved Operations Manual, then your verdict must be for the Defendants and against the Plaintiffs"?

The Court: "On this issue."

Mr. Nesbett: "On this issue." Now, how would that, your Honor, reconcile with Instruction No. 1, the [253] portion on page 2 of Instruction No. 1, the remaining portion that you did not strike?

The Court: What sentence are you referring to?

Mr. Nesbett: "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by * * *"

The Court: Wait a minute. What page are you referring to?

Mr. Nesbett: That is Plaintiffs proposed Instruction No. 1.

The Court: Oh, Plaintiffs Instruction 1?

Mr. Nesbett: Yes, sir. It would be on the second page.

The Court: The second page?

Mr. Nesbett: Yes, the second paragraph, that's the remaining portion that you didn't strike. Now that, taken in connection with Instruction 4, as your Honor's terminated, I suggest would leave them in a quandary, wouldn't it?

The Court: Well, in Defendants Instruction 4: "If you find that at the time it crashed the aircraft was overloaded, in violation of," and so forth, "then your verdict must be for the Defendants." Plaintiffs 1: "If you find that the Defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading * * *" Well, you see, Plaintiffs says, "by the preponderance of the [254] evidence." I don't think that there's anything inconsistent with those two instructions. Well, I will give Instruction No. 4.

Mr. Nesbett: Adding the words, "on this issue," sir?

The Court: Adding the words, "on this issue"

after the word "Plaintiffs." Now, I don't see anything wrong with Instruction No. 5 but I suppose I'm going to have an argument from you, Mr. Nesbett, so you can tell me what you disagree with in No. 5.

Mr. Nesbett: Well, first of all it attempts to recap all the other instructions and it can be entirely confusing in attempting to do that. The defenses they have asserted are certainly set out in separate instructions and even recognized separately in my proposed instructions.

Mr. Talbot: I can't see anything, for example, what confusion would be caused by paragraph 2, for example, of Instruction 5?

Mr. Nesbett: What purpose does it serve? How does it elucidate or help the jury to find their way along? It's covered thoroughly in another instruction as to the effect and meaning of obtaining the consent of Farwest General Agency.

The Court: Well, I'll strike then the first 1, 2, 3 defenses because I think the defenses have been set forth.

Mr. Nesbett: The other—the rest of the instruction merely tells the jury, "Now, Lloyd's have asserted various defenses which they are entitled to do." Well, they have never [255] questioned that; the policy is in evidence. Pertinent provisions are even quoted in the instructions.

The Court: Well, I find no harm in giving that. I'm coming down to the last page, 9, "You are also instructed that Defendants need not prove any relationship of cause and effect between any of the

alleged breaches of the certificate of insurance and the crash of the aircraft." Do you object to that?

Mr. Nesbett: Your Honor, we have come to a point that I have never had an opportunity to argue to your Honor.

The Court: Well, I have read the cases that have been cited here and I think that that is the rule. I think the cases hold that there does not have to be any relationship between cause and effect.

Mr. Nesbett: Your Honor, if your Honor will analyze the Bruce case, if your Honor will analyze any of the other cases cited by Mr. Talbot you will find that they were dealing with a policy where there was an exclusion in every instance, an exclusion where the policy said, "this policy shall not apply," or "this policy does not cover," and then dealing specifically with high explosives in each instance, with one exception, and that is the Hansen case where they dealt with unlawful purpose and also a violation of the regulations. Now——

The Court: Well, I have read each of the cases as cited by counsel and I think the cases sustain his theory. [256] And not only that, but I Shepardized them to see what happened to them and I can't find where they have been overruled.

Mr. Nesbett: I Shepardized every one of them and read all the citations and, your Honor, every one of them dealt with the situation as I mentioned, as an exclusion where the policy never in the first place covered. Now, you have got the difference between an exclusion and the condition, because in

the condition the policy does cover subject to a condition subsequent.

The Court: Well, you have made your objection and I will overrule the objection and I will give the instruction. Now, there's one phase of the law here that neither counsel seems to have paid any attention to and I think it's rather important, so I provided an instruction. I will read it to you and I expect I'll have some objections to it. "You are instructed that the insurance policy in this case was written by the defendant insurance company, and inasmuch as defendant wrote the policy the language thereof must be interpreted and construed most favorably to the insured and against the insurer. And when the language is susceptible to two constructions it should be construed most favorably in favor of the insured.

Exceptions and conditions are constructed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the [257] construction must be adopted which is most beneficial to the insured."

Now, I might say that I have picked that out bodily from the opinion that I am filing in an insurance company case. I have cited California cases. Now, it may be that the California rule doesn't apply up here, but it seems to me that this is something that should be called to the attention of the jury. Now I will hear you.

Mr. Talbot: We object most strenuously to that

instruction, your Honor. It's perfectly good law, of course, but it's only the law in a case where there is some ambiguity in the provisions of the policy upon which the insurance companies rely.

The Court: Well, don't you think there is ambiguity here?

Mr. Talbot: None whatever, and we rely on three of the most plain, simple, ordinary English sentences ever constructed by an insurance company, and——

The Court: We are having a dispute here. We have a lawsuit; there must be some dispute.

Mr. Talbot: But not over the plain and simple language of these three provisions, your Honor, and I think that instruction is—would have to be interpreted by the jury as a finding by the Court that there is some ambiguity in these three short, simple phrases upon which we rely. Now, if [258] the Court can find some ambiguity in any one of those three phrases or sentences, then I say as a matter of law it's up to the Court to resolve that ambiguity and to construe this document for the jury and tell the jury what it means if it's ambiguous and construe it against the insurance companies to be sure, but that's the job for the Court and not for the layman on the jury, and to turn them loose on this policy with instruction of that kind, I think your Honor will have them finding ambiguities all over the plane where they don't exist. I frankly and honestly am not confused by any provisions in here. It's just simple, straightforward talk. You have got to get the written consent

from Farwest General Agency. There's no ambiguity, and so on. I agree wholeheartedly with the instruction, but I think—as being the law—but I think it's something that the Court should apply and determine if the Court finds that these are ambiguities.

The Court: What do you mean by "Any loss, damage or liability arising from," is that clear?

Mr. Talbot: "Any loss, damage or liability arising from any flying * * *" that is, that means flying in which the plane crashes. That is what we have got here. There's no dispute about that. There was flying and the plane crashed.

Now, to go on: "In which a waiver issued by the Civil Aeronautics Authority is required * * *" Now, that's a matter of law for your Honor, whether or not under the CAB [259] regulations a waiver was required. It was or it wasn't—question of law for the Court and not a question of fact for the jury. But no ambiguity, certainly, "unless with the express written consent of Farwest General Agency for insurers." Well, there's nothing there to construe. There's no ambiguity to resolve.

The Court: What do you have to say?

Mr. Nesbett: Well, I think your Honor's instruction is exactly proper. Mr. Talbot and I disagree—I disagree with your Honor as to cause and effect where it's only condition—I say the Bruce case applies only to an exception there. Now, three reasonable people—myself, understand it. I read that first clause in the exception as applying to any loss arising out of flying in which a waiver

should have been procured and wasn't as applying and being intended to apply in situations where airplanes—say, for example, are damaged and partially repaired and required ferry permit and to fly them back to base to repair, where failure to obtain that waiver would have prevented flying that airplane in an unairworthy condition. Now that would be the specific application and I think the reason for it was like that, for a clause like that, and as long as he's raising a technical defense that a waiver was not obtained to carry dynamite when it's conceded that the dynamite had nothing to do with the accident—he's simply relying on a technical wording of a provision and certainly 3 or 4, [260] possibly all 12 jurors can see it in a different light and certainly guidance to them as to how—what they should be guided by in resolving those ambiguities is helpful.

And, your Honor, I happened to just be briefing one of your colleagues, Judge Yankwich, in Southern District of California where he had an airlines case and he did just exactly that and I have the citation. But it seems applicable there at that time, appropriate in that case, and I think it is here.

The Court: Just a minute—you're getting too fast—we're getting in front of the reporter. (Short pause.)

Well, insurance policies have been a great mystery to me. I have been reading them from—well, for many years from the bench and every time I read one I'm amazed at how much I can't understand about them and when we started this case

there was quite an argument here about what is meant between general exclusions and general conditions. Now, I don't know yet what they mean by general—what the difference is between general exclusions and general conditions. Personally, I think this is a question for the jury.

However, now I'm—I've added to my instruction: "If you find there is any ambiguity between the general exclusions and general conditions." Then what we are concerned here is not with the policy but the exclusions and the conditions. The Defendant is relying upon a general condition as well as a [261] general exclusion. I don't know what the meaning—what the difference is and I doubt if anybody can tell me except maybe somebody, some insurance man who wrote this and knows and understands it. And I see no—I think that an insurance Company, when they write the insurance policy should write it so everybody can understand it, particularly the insured and more particularly the Court. The Court can't understand it, so I think it's a proper instruction and I will give the instruction and it is given.

Mr. Nesbett: Where were those words inserted, your Honor?

The Court: At the beginning: "If you find there is any ambiguity between the general exclusions and general conditions you are instructed that the insurance policy in this case was written by the defendant insurance company * * *" Now, I also have some general instructions here that I am going to give relative to the general law, burden of

proof and so forth and so on. I don't think it's necessary to discuss them with you because these are instructions that have been mimeographed here and have been given by the Court. How much time are you going to want to argue this case?

Mr. Talbot: I could use a couple hours very easily, your Honor.

The Court: No, you can't either.

Mr. Talbot: If I had it. [262]

The Court: Well, this is a technical case. Ordinarily I restrict parties to 30 minutes on the side, but I might do better than that.

Mr. Talbot: Our rules allow an hour, your Honor.

The Court: An hour?

Mr. Talbot: Yes, sir. Local rule.

The Court: What's your rule?

Mr. Talbot: It's right next to the number Mr. Nesbett hooked me on or he may yet.

Mr. Nesbett: That would be about Rule 3, then.

Mr. Talbot: Rule 3, I believe.

The Court: I think 45 minutes ought to be sufficient in this case, to the side. And I will call down the jury and let you start your argument.

Mr. Nesbett: Your Honor, can't we have a few minutes to assemble our data here before we start?

The Court: Well, who is going to open the argument here? There's no—I don't think there's any dispute as far as the Plaintiff is concerned. The burden here, if I understand the case correctly, the Defendants will admit that there is liability unless they are relieved by the exceptions or the exclusions

and it seems to me that the Defendants ought to open and close.

Mr. Nesbett: If that is your Honor's ruling that is it. [263]

The Court: What are you going to argue about your case? They admit it. Are you going to anticipate the argument of the Defendant?

Mr. Nesbett: At this point, now knowing his proof, I can certainly set out as a Plaintiff and make an opening and closing argument and the rule does say Plaintiff—it doesn't say the affirmative defendant or anything of that nature.

The Court: Well, do you want to open and close?

Mr. Nesbett: Well, I had expected that that would be my privilege.

The Court: Well, now, you're not ready. You want to gather your notes together. Maybe opposing counsel is ready?

Mr. Talbot: I'd like 5 minutes at least, your Honor.

The Court: All right. We'll give you 5 minutes. We will recess until 5 minutes to 4:00. Call the jury down 5 minutes to 4:00.

(Whereupon, at 3:55 o'clock p.m., June 3, 1958, court reconvenes following a 5-minute recess, the jury having resumed their places in the jury box, and the following proceedings were had:)

The Court: Is it stipulated that the jurors are present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Your Honor, before Mr. Nesbett begins, may I inquire if your Honor is going to instruct the jury this [264] evening?

The Court: No.

Mr. Talbot: Might I suggest, your Honor, that Mr. Nesbett and I might have a chance to meet with your Honor briefly again in the morning before the jury is instructed? My thought was that counsel could examine the instructions this evening on the question of whether or not there is some ambiguity between them.

The Court: Well, I think the rule provides that the Court should advise the attorneys as to what instructions it intends to give and that is all it requires.

Mr. Talbot: Yes, I am sure of that, your Honor.

The Court: And we have had one conference and I don't believe I'll have time in the morning to have another conference. I will allow each side 45 minutes to argue the case. Now, I don't mean 46 minutes or 48 minutes; I mean 45 minutes. I am going to hold you to strict compliance with the time.

(Thereupon, argument was had by both counsel for the Plaintiffs and counsel for the Defendants, after which the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not allowed to have any-

one discuss it with you. Even though [265] you have heard all the evidence in this case and the arguments of counsel you are not qualified at this time to formulate or express any opinion as to the rights of the parties. You will not be qualified until after the Court has read you the instructions and submitted this case to you for your decision. Until that time you are to keep an open and free mind without coming to any conclusion as to whether the Plaintiff should or should not recover and above all, not to talk to anyone, allow anyone to talk to you or express any opinion as to the rights of the parties. With that admonition we will now recess until 10:00 o'clock tomorrow morning.

(Thereupon, at 5:15 o'clock p.m., June 3, 1958, this case was continued to the next morning at 10:00 o'clock a.m., June 4, 1958.) [266]

The Court: Is it stipulated that the Jury is present in the box?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

INSTRUCTIONS TO THE JURY

The Court: Let the record show a motion has been filed this morning—a written motion has been filed. I will give the Clerk the file. Under the rules, I will deny the motion.

Ladies and Gentlemen of the Jury: You have heard the evidence in this case and it now becomes my duty to instruct you as to the law applicable thereto.

When you were accepted as jurors, you obligated yourselves by oath to try well and truly the matters at issue between the Plaintiff and the Defendant in this case and a true verdict render according to law and the evidence as given to you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, when [268] arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you because you are the triers of the facts.

All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the construction of statutes and other writings, and other rules of evidence are to be decided by the Court and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately related to matters of law that a determination must

be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses, and in determining the credit you will give to a witness and the weight and value you will attach to his [269] testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witnesses; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law makes you subject to the limitations of these instructions, the sole judge of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which

do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others. A witness is presumed to tell the truth. [270]

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. Some of the evidence in this case is of the type called "circumstantial" and distinguished from direct evidence; direct evidence is given when a witness testified of his own actual and personal knowledge of the facts in issues and to be proved. Circumstantial evidence is given when a witness testifies in like manner to facts from which may be inferred, the facts in issue and to be proved. Accordingly, circumstantial evidence may be defined as that type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason in the common experi

ence of mankind. Circumstantial evidence is sometimes quite as convincing as direct evidence; in other cases, less so, but to be of any weight or force against a person—but to be of any force or weight in a case, [271] circumstantial evidence must be of such nature as reasonably to lead to the inference of the fact to be proved; in cases where proof consists of both direct and circumstantial evidence, both should be carefully considered. It is for you to determine the weight of all the evidence that has been admitted in this trial for your decision.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think that such facts and circumstances warrant it.

During the trial of a case, it may be suggested or argued that the credibility of the witness has been "impeached." To "impeach" a witness means to bring or throw discredit on; to call in question;

to challenge; to impute some fault or defect to. [272]

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity; or by proof of his bias, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing significance. But a wilful falsehood always is a matter of importance. Whenever it is practicable [273] and reasonable, you will attempt to reconcile conflicting or in

consistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

In this case as in all civil cases the burden is upon the plaintiff to prove his case by a preponderance of the evidence. On the other hand, in this case the burden is upon the defendant to prove by a preponderance of the evidence the claims that he has made in his claims that the policy does not provide protection. Preponderance of evidence, what I am trying to say, is this: That ordinarily, if the plaintiff has the burden of proving this case by preponderance of the evidence but when in this case the defendant raises an issue which has been raised here, then the preponderance is upon the defendant to sustain that issue. Preponderance of evidence means the greater weight of evidence, such evidence as when weighed with the evidence which is offered to oppose it has a greater convincing power in the minds of the jury. While the plaintiff is required to prove his case and that is true also as to the defendant in this case, that is, to prove his claims by the greater weight of evidence, this does not require proof beyond any fact; does not require the parties to prove any fact beyond a preponderance of the evidence. A fact is [274] sufficiently proved if the greater weight of the evidence is in its favor. If the weight of evidence in your minds is equally balanced as between plaintiff and defendant or in this case, if it's balanced between the defendant and the plaintiff upon the claim of

the exemptions, then the weight should be—then the verdict should be against the party who had the duty of proving the case. In other words, the party who presents the issue has a duty of proving his case and his evidence must be such when considered as a whole as to justify you finding in favor of the parties who present the issue to you for your determination.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions which you would apply to any other subject coming under your consideration and demanding your judgment.

You are to consider these instructions as a [275] whole. It is impossible to cover the entire case with a single instruction and it is not your province to elect one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case and apply those facts and apply

to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

It is the duty and the right of an attorney to protect the interests of his clients by objecting to the introduction of, or moving to strike out, evidence that he deems improper, as well as to offer evidence he believes competent for admission. You must not be rejudiced against any party to this case because the attorney for such party may have made such objections or motions or offers, regardless of the Court's ruling thereon.

At the close of the trial, counsel have the right to argue the case to the jury. The arguments [276] of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may

be mistaken in their recollection of testimony during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

This is an action upon an insurance contract—an insurance policy—and an insurance policy is nothing more than a contract. If you find that there is any ambiguity in this contract or in the insurance policy between the general exclusions and the general conditions—you will remember that counsel talked to you about exclusions and conditions. If you find that there is any ambiguity between the general exclusions and the general conditions, you are instructed that the insurance policy in this case was written by the defendant insurance company, and inasmuch as the defendant wrote the policy the language thereof must [277] be interpreted and constructed most favorably to the insured and against the insurer. And when the language is susceptible of two constructions it should be construed most favorably in favor of the insured.

Exceptions and conditions are construed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the construction must be adopted which is most beneficial to the insured.

You will remember at the beginning of this case I believe that there was an agreement that coverage—that the insurance policy provided coverage

unless the coverage was denied by the exclusions. You are instructed that the defendants have asserted three defenses, which are based upon provisions of the certificate of insurance, which constitutes the only contract or agreement between the parties, and that your verdict must be in favor of the defendants and against the plaintiff if you find, by a preponderance of the evidence—now, I want to stop there and emphasize "preponderance of the evidence." Some of you have served on criminal cases. The rule in criminal cases is different than it is in civil cases. In criminal cases, the rule is that the evidence must be proved beyond a reasonable doubt; in civil cases, it is the preponderance of the evidence. Your verdict [278] must be in favor of the defendants and against the plaintiff if you find by a preponderance of the evidence, having in mind all the instructions given you by the Court, that the defendants have established all or any one of these three defenses. You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur.

The defendants contend, among other defenses, that the policy of insurance here involved relieves them from liability for payment for the loss of the airplane because it was loaded in excess of the

weight permitted in the Operations Limitations as established by the Civil Aeronautics Authority and was therefore in violation of Paragraph 2 of the General Conditions contained in the policy of insurance which reads as follows:

> "2. The aircraft shall be operated at all times in accordance with its Operations Limitations and/or CAA approved Operations Manual, and in accordance with operations authorized as set forth therein." [279]

The defendants have asserted this defense as an affirmative defense and are therefore required to prove all of the elements of the defense by a preponderance of the evidence.

In considering the defense that the airplane was loaded in excess of the permissible load limit at the time it crashed you must consider all the evidence presented by both plaintiff and defendants to determine whether the defendants have proved by a preponderance of the evidence that the airplane actually was loaded in excess of its permissible load limit. If you find that the defendants have not proven by a preponderance of the evidence that the airplane was loaded in excess of its permissible load limits you must find for the plaintiff and against the defendants on this defense.

If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense.

The defendants contend, among other defenses,

that Paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions [280] insofar as applicable to this defense reads as follows:

> "This certificate and/or policy does not cover the use of the aircraft or any unlawful purpose if with the knowledge and consent of the assured."

This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

In this connection you are instructed the word "purpose" is defined as "the object; effect, or result, aimed at, intended, or attained."

You are instructed that the meaning of the word "use" is defined as: "The purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved."

You are also instructed that the policy of insurance here involved in Paragraph 8 reads as follows: "Purposes for which aircraft will be used: Private business and private pleasure flying and commerical operations including passenger and freight

flights for hire or reward but excluding student instruction."

If you find that the Defendants have not proven by a preponderance of the evidence that the plaintiff in attempting [281] to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc.

If you find that the defendants have proven by a preponderance of the evidence in attempting to transport dynamite the airplane was being used for an unlawful purpose then you must consider whether or not such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines.

In this connection you must consider all the evidence and determine whether the defendants have proven by a preponderance of the evidence that such use of the airplane was undertaken with the knowledge and consent of the plaintiff Cordova Airlines, Inc.

The defendants contend, among other defenses, that the flight in question—that for the flight in question, the plaintiff failed to obtain a waiver as required by Civil Air Regulations Part 49 and also failed to obtain written permission from the Far

West General Agency to make the flight [282] in question.

The policy of insurance reads as follows insofar as applicable to this defense:

"This Certificate and/or Policy does not cover:

"1. Any loss, damage or liability arising from:

* * *

"(c) * * * or any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers."

In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit commencing on page 3 the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from Civil Aeronautics Authority.

In this connection you are instructed that the Civil Aeronautics Act defines "United States" as:

"United States" means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof."

The plaintiff contends that the Territory of [283] Alaska was included in the order, that plaintiff was

engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

If you believe that Defendant's Exhibits A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense.

If you believe that the Defendant's Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1 (c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane "arose from" and was "the result of" the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

If you find that the loss of the airplane "arose from" or was "the result of" plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants [284] on this issue.

One of the defenses asserted by the defendants in this case is that, at the time it crashed, Cordova Airlines aircraft N-1569-C was being used for an

unlawful purpose, with the knowledge and consent of Cordova Airlines. In considering this defense, you must first determine whether or not the aircraft was engaged in transporting explosives at the time of its loss. If you find that the aircraft was carrying explosives then you must further determine whether or not any explosive so carried consisted of dynamite. If you determine that the plane was carrying dynamite then you must determine whether a waiver was secured by the United States Civil Aeronautics Authority authorizing the carrying of dynamite on the flight on which the aircraft was destroyed, providing you find that a waiver was necessary. If you find that the aircraft was carrying dynamite and no such waiver had been secured and find also that a waiver was necessary from the Civil Aeronautics Authority then you are instructed that the carrying of dynamite was unlawful. Dynamite is classified by the applicable government regulations as a Class A explosive, and the transportation of dynamite was, accordingly, prohibited by such regulations, unless a waiver was secured from the Civil Aeronautics Authority, unless such waiver had been waived. By Act of Congress, it is a criminal offense for any person [285] to knowingly deliver or cause to be delivered to an air carrier or to the operator of any civil aircraft, for transportation in air commerce, or for any person to cause the transportation in air commerce of, any shipment of property the transportation of which is prohibited by any rule, regulation, or requirement prescribed by the United States Civil

Aeronautics Board, relating to the transportation, packing, marking, or description of explosives.

The knowledge and consent of Cordova Airlines of the carrying of dynamite on the flight in question is a question of fact for you to determine. Ordinarily, the knowledge and consent of an agent is attributable to and is legally binding upon the principal.

One of the defenses which the defendants assert is their allegation that the aircraft was not being operated in accordance with its Operations Limitations and/or CAA approved Operations Manual and in accordance with operations authorized as set forth therein. Defendants claim that at the time it crashed the aircraft was overloaded, in violation of said regulations. In considering this defense, you must determine the maximum weight of aircraft and contents allowable under regulations for this particular aircraft. You must next determine whether or not the aircraft was laden in excess of its legal limit. If you find that at the time it crashed the aircraft was overloaded, in violation of [286] its Operations Limitations or CAA approved Operations Manual, then your verdict must be for the defendants and against the plaintiffs on this issue.

Further reference is made to the defense asserted that Cordova Airline aircraft No. N-1569-C was allegedly being used for an unlawful purpose with the knowledge and consent of the plaintiff airline. You are instructed that the applicable United States Civil Aeronautics Board regulations provide that no air carrier or other operator of air-

craft shall knowingly accept explosives for carriage by air unless the shipper or authorized agent has issued a certificate to the air carrier, certifying that the shipment complies with the Civil Aeronautics Board regulations governing the transportation of such explosives and it is a criminal offense for any person knowingly to violate the provisions of said regulation. Such a certificate, that the shipment of explosives complies with the regulations, is required by law prior to the carriage of explosives by air, in addition to any waiver which may or may not have been issued by the Civil Aeronautics Authority for the flight upon which this aircraft was destroyed. If you find, then, that the purpose of this particular flight on December 18, 1955, was to transport a quantity of explosives with respect to which no certificate of compliance had been issued to the air carrier or operator by the shipper, and that such use [287] of the aircraft was with the knowledge and consent of Cordova Airlines, or the pilot (if you find that the pilot was an employee of Cordova Airlines) then your verdict must be for the defendants and against the plaintiff on this issue, without regard to the question of whether or not any waiver had been secured from the Civil Aeronautics Authority for the flight upon which the airplane was destroyed.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

I have had prepared for your consideration two verdicts which you will take into your jury room. Your first duty in retiring to the jury room will be to elect one of your members as foreman. The foreman will be your spokesman. If [288] you wish to communicate with the Court you will communicate with the Court through your foreman. When you have reached a verdict you will have your foreman to sign the verdict and return it to this Court.

Verdict No. 1 reads as follows:

> "We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.
>
> "Dated at Anchorage, Alaska, this .... day of June, 1958."

Verdict No. 2 says:

> "We, the jury, duly impaneled and sworn to

try the above-entitled case, do find for the defendants and against the plaintiff.

"Dated at Anchorage, Alaska, this .... day of June, 1958."

This is a case where you are going to have to find everything for the plaintiff or nothing. There is no way to adjudge just the amount. If you find for the plaintiffs, you are going to have to find for the entire sum of $15,200.00.

Does either the attorney for the plaintiff or the defendant have any objection to the instructions as read to [289] the jury? Now, you have made your record as to the instructions I didn't give. Now, these are as to the instructions that I have given and you have also made your objections as to instructions which I did read to the jury. Now, do you have—at this time, you can—I don't want any argument—you can just make your objections, if you have any objections.

Mr. Talbot: May we approach the bench, your Honor?

The Court: Yes, you may approach the bench.

(Thereupon, both counsel for the plaintiff and the defendant, together with the Court Reporter approached the bench and the following proceedings were had, out of the presence of the jury:)

Mr. Talbot: The defendants object to the instructions as given to the jury by the Court upon the ground that part of the instructions require the

jury, in order to find that the defendants have established their affirmative defenses, to find as a matter of fact that the violations of the policy which defendants allege caused or contributed in a causal fashion to the crash which in fact occurred.

It is our position that the jury need not find any causal relationship whatever between any violation of the conditions and exclusions of the policy on the one hand and the fact of the crash which did occur. That's my——

The Court: Do you have any objections?

Mr. Nesbett: Plaintiffs' only objection are [290] those made at the time the hearing was held yesterday in connection with which instructions were to be given and which deleted and the plaintiffs will adopt only the objections made at that time with respect to the portions that were given.

The Court: Well, you have a record of the transactions yesterday and the objections that were made and the rulings of the Court.

Mr. Nesbett: Yes.

Mr. Talbot: Your Honor, by stating the foregoing objections the defendants do not waive or abandon any of their objections previously made.

There is one other point, your Honor, while we are here: It has been our practice in this court to allow the jury to have the exhibits for their examination as part of their——

The Court: Well, I am going to send them the exhibits.

Mr. Talbot: Thank you, your Honor.

Mr. Nesbett: Does the jury get the instructions?

The Court: No, I won't send them the instructions.

Mr. Talbot: One last point, your Honor. I am wondering if the jury knows that they are entitled to come back to the Court for further instructions if they——

The Court: I am not going to say that to them. I don't want them to come back for further instructions.

Mr. Talbot: Thank you. [291]

The Court: Here, I will give you copies of these verdicts if you want them.

Mr. Nesbett: I have them.

The Court: Oh, you have?

(Thereupon, both counsel for the plaintiff and the defendant, together with the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the jury:)

The Court: Swear the bailiffs.

(Thereupon, the jury bailiffs were sworn.)

The Court: May I have a stipulation from the attorneys that the exhibits may be sent to the jury room?

Mr. Nesbett: Yes, your Honor, the plaintiff agrees.

Mr. Talbot: Yes, your Honor.

The Court: Then I will allow the exhibits to be taken to the jury room, but I say to the jury that I will not allow the instructions to be taken to the

jury room because I do not follow the instructions word by word and if I give you the written instructions, you'd only have part of the instructions, so you will have to remember the instructions—you will have to remember the instructions as read by the Court.

I want to impress upon you again as I have before, that this is a question of fact and you are the ones who determine the facts in this case. You may now retire to the [292] jury room.

(Thereupon, the jurors proceeded to the jury room.)

The Court: Mr. Nesbett, my experience with juries have been that——

Mr. Talbot: Your Honor, there is still a juror present, if the Court please.

(Thereupon, the door to the jury room was closed and the following proceedings were had, out of the presence of the jury:)

The Court: My experience with juries have been that they will not reach a verdict before they at least have one meal. I won't be available until 2:30 o'clock.

Mr. Nesbett: We understand you are going to Palmer?

The Court: And I won't be available until about 2:30, so you needn't make any arrangement to be here until 2:30 or 3:00.

Mr. Nesbett: Thank you.

Recessed: 10:50 o'clock a.m.

Reconvened: 2:45 o'clock p.m.

(At 2:45 o'clock p.m., all counsel being present and the trial jury being present the following proceedings were had:)

The Court: Is it stipulated that the jury is present and in the box? [293]

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Yes, your Honor.

The Court: Ladies and Gentlemen of the Jury, have you reached a verdict?

The Foreman: We have, your Honor.

The Court: Would you give it to the bailiff, please?

(The verdict was handed to the Court and thereafter handed to the deputy clerk.)

The Court: Read the verdict.

Deputy Clerk: "In the District Court for the District of Alaska, Third Division. Cordova Airlines, etc., Plaintiff, vs. Underwriters, etc., Defendants, No. A-12,349. Verdict No. 1. We, the jury, duly impaneled and sworn to try the above-entitled case, do find for the plaintiff and against the defendants, and we do find that the plaintiff is entitled to recover the sum of $15,200.00 from the defendants.

"Dated at Anchorage, Alaska, this 4th day of June, 1958. Signed Kyle I. Turner, Foreman."

The Court: Ladies and Gentlemen of the Jury, is that your verdict?

Jury: Yes.

The Court: Do you wish the Jury polled?

Mr. Talbot: No, your Honor.

The Court: Ladies and Gentlemen of the Jury, you [294] are about to be excused from further service on this case. I wish to express to you my appreciation of the fact that you have been able to reach a verdict in this case. I don't think this was a simple case by any means; I think it's one of the more difficult cases. The fact that you have been able to reach a verdict seems to me that's some indication, at least, that you have paid attention to the evidence and knew what the testimony was.

You will be excused now until 10:00 o'clock next Monday morning. The Court will stand in recess.

Recessed: 2:55 o'clock p.m. [295]

HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR NEW TRIAL

Proceedings

June 20, 1958—1:30 o'Clock P.M.

The Court: 12,349, Cordova vs. Lloyd's. Ready?

Mr. Talbot: Yes, your Honor.

The Court: This is your motion and I suppose you can start.

Mr. Talbot: Thank you, your Honor. If the Court please, Mr. Nesbett: Your Honor, before proceeding, I would move the Court for permission to submit a written order amending our motion in the following respect: The motion as filed prayed for judgment notwithstanding the verdict or in the

alternative for a new trial. I should like leave of the Court to amend that motion to provide for judgment notwithstanding the verdict and a new trial and urge the Court to grant both motions.

The Court: Well, I have no objections to the amendment. Will you file a written amendment?

Mr. Talbot: I will, yes, your Honor. Now, your Honor, with reference to the motion for judgment notwithstanding the verdict, this refers to the first two affirmative defenses of the defendants; first, that the aircraft was being used for an unlawful purpose with the knowledge and consent of the assured. In viewing the record and the evidence, your Honor, I feel quite certain that there is no dispute as [297] to any of the material facts necessary to decide that issue; that is, looking back at the entire trial. It seems to me that the only controverted material facts had to do with the question of overloading and that mainly with the issue of how much dynamite was being carried and how much gasoline and other paraphernalia was or was not on board, but with regard to this defense of using the aircraft for an unlawful purpose, the carriage of dynamite and circumstances under which it was carried, are not subject to bona fide dispute, and I, therefore, urge the Court that the question of whether or not the plaintiff was able to bring itself within the coverage and protection afforded by Civil Aeronautics Board regulation S-712 which is Exhibit—a portion of—Exhibit A; that that is a question of law for the Court and one which should be determined by the Court.

My recollection of the instructions which your Honor gave were to the effect that the carriage of dynamite was in violation of regulations of the Civil Aeronautics Board unless permission was granted to plaintiff by this Order No. S-712 which became effective on December 2, sixteen days before the crash, and I would ask your Honor to re-read and reconsider that particular regulation and decide for us whether or not as a matter of law the plaintiff was able to bring itself within the permission granted by that regulation. It seems to us that the plaintiff was not successful in [298] that regard.

There are three particular provisions of the Order, part of this regulation S-712, that I would like to call to the Court's attention: "In consideration of the foregoing, the Board finds that an authorization, as more specifically set forth hereinafter, permitting the Air Force to deviate from certain provisions of Part 49 would not adversely affect safety." So, in the first place, we have an order which allows the Air Force to do certain things, and we submit that this was action taken by Morrison-Knudsen Company and Cordova Airlines, Inc., and not by the United States Air Force.

Now, the very first paragraph of the Order—portion of this regulation—as I read it limits the effect of this Order to the transportation of certain security-classified Class A explosives in civil aircraft. Now, we submit that ordinary garden variety commercial dynamite, which this was, is not a security-classified explosive and that it clearly was

not within the contemplation of the Civil Aeronautics Board when it made regulation S-712.

The next provision in the Order is as follows: "Shipments of such explosives by civil aircraft be restricted to charter or contract aircraft obtained for the exclusive purpose of transporting such explosives." I think it is undisputed, your Honor, that this aircraft was not obtained by the Air Force and that it was not obtained [299] for the exclusive purpose of transporting these explosives. As a matter of fact, Cordova Airlines management denied any knowledge that the plane would be used to carry explosives and the evidence concerning the agreement between Cordova Airlines, Inc., and Morrison-Knudsen was that this was a general ninety-day charter for the carriage of passenger and freight generally.

The next provision requires that the Department of the Air Force certify to the Civil Aeronautics Board that any shipment of explosives carried under this regulation conform with applicable CAB regulations for handling of explosives. We have no evidence that the Air Force took any active part whatever in this movement or—of explosives—or, that they gave the certificate which the regulation required them to do.

There is a further provision that the explosives are to move under a hand-to-hand signature service to be furnished by the carrier; that certainly was not done so far as we know.

It's our position, your Honor, that reading this regulation as a whole, and applying to it the un-

disputed facts, that Cordova has not brought themselves within the coverage of regulation 712 as a matter of law, and that, therefore, the aircraft was being used for an unlawful purpose. [300]

Now, the next phrase, and that exclusion has to do with the knowledge and consent of Cordova Airlines. We submit that as a matter of law, your Honor, the knowledge and consent of the pilot was acting as master of this ship, so to speak, and must be held binding upon Cordova Airlines.

The Court: Didn't I instruct the jury to that effect?

Mr. Talbot: Your Honor——

The Court: I instructed the jury that the knowledge of the agent was the knowledge of the principal.

Mr. Talbot: Your Honor qualified it by saying, "usually" or "customarily."

The Court: Well, that's true; there might be some explanation. Now, I don't know whether that rule is one hundred per cent effective or not, but that's the ordinary rule, ordinarily. I said "ordinarily, the knowledge of the agent is the knowledge of the principal," and I can understand in some instances that rule might not apply.

Mr. Talbot: I agree with your Honor but if there had been any evidence which would tend to change the application of the rule, then I think the instruction would have been proper, but in——

The Court: But if I remember correctly, you didn't request that instruction; that is one of the instructions I gave myself. I thought the jury

should be told that [301] if the pilot had knowledge, well, that would be knowledge of the principal, and if I was handling the case without a jury, deciding the case without a jury, I would have held without any question that the fact that the pilot had knowledge was the knowledge of the company, but I didn't—I wasn't passing upon the facts of the case; I left that to the jury.

Mr. Talbot: Well, we agree that your Honor is not called upon to pass upon the disputed facts, but here, we submitted the following proposed instruction on a point: "You are instructed that the knowledge and consent of the pilot of the aircraft is attributable to and is legally binding upon Cordova Airlines." Your Honor changed that instruction by inserting the word "ordinarily" and omitting "Cordova Airlines" and substituting "the principal," without explaining to the jury what the principal is and I think weakened the instruction to the point where the jury could speculate whether or not they were going to attribute Haley's knowledge to the Airline.

Now, even if Regulation 712 applied here and they had blanket permission to carry explosives, we find no waiver anywhere in Regulation 712 of the CAB requirement that the shipper of any shipment of explosives furnished the carrier with a certificate concerning its compliance with the law and also imposing a positive duty on the carrier to [302] require him to receive such a certificate. There is no evidence that that was done here. The applicable CAB regulation even sets forth a form

of certificate to be given by the shipper with the provision that a certificate in that form will be deemed prima facie compliance with regulations, but I think that in view of that positive requirement of the law, that Cordova Airlines had a burden to show that they or their shipper complied with the regulation and they did not. I concede there is very little evidence upon the point except Mr. Evans' testimony that he did not—he ordered the movement of the explosives and he did not give any certificate. That is my recollection of the extent of the evidence on the point, but it's our position that even if Regulation 712 governed, there still was no excuse for not requiring and receiving the certificate that the shipment complied with CAB regulations and was not, for example, liquid nitroglycerin or some other substance which could not properly be carried under the circumstances.

What I have said about this Regulation 712 applies equally to our second defense; that is, that this plane was engaged in flying for which a waiver of the CAA was required, and a CAA waiver being required, it was also required that Cordova have the express written consent of Farwest General Agency as agent for the Underwriters. I concede that if Regulation 712 applied to this movement, then this defense [303] of failure to get permission from the insurance company fails because then no waiver from CAA would have been required. 712 would have been blanket authority, but in the absence of Regulation 712, or its inapplicability, the only way the dynamite could have been carried

would have been with a CAA waiver and with the permission of the Underwriter.

Now, for those reasons we submit that the defendants are entitled to judgment notwithstanding the verdict on each of these two defenses because the facts are not subject to bona fide dispute—carriage of dynamite and the circumstances of its carriage being admitted all the way around.

Now, with regard to the Motion for a New Trial, this has to do with our third defense that the aircraft was overloaded in violation of its Operations Limitations. I agree that there was a question of fact for the jury as to whether or not the airplane was overloaded. There was in my mind believable evidence on both sides. Mr. Mauer testified eight cases; Mr. Evans testified sixteen cases, and I think it possible that if the jury believed Mr. Mauer, that they might, if they believed other evidence in the case, find that the plane was not overloaded, but in view of the instructions which the Court gave on the point of causal relation between the overloading, if it existed, and the crash, in view of those conflicting instructions, I am unable to know or ascertain whether the jury found the plane was [304] overloaded or whether they didn't.

Your Honor gave at the request of the defendants the following instruction which we believe to be correct, namely, "You are instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the

aircraft. That is to say, the defendants need not have proved that the alleged carriage of dynamite, or the alleged overloading of the aircraft, in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur."

The Court: When I gave that instruction, I thought the Jury could rely upon that instruction and bring in a verdict for the defendant. Now that was their problem.

Mr. Talbot: Your Honor was telling the Jury that they need not find that the overloading had anything to do with the crash—is the way I read that instruction.

Now, in three previous instructions——

The Court: No, I instructed the Jury that there didn't have to be a causal relationship between the overloading and the crash.

Mr. Talbot: Yes, your Honor, and with that, we wholeheartedly agree.

The Court: And from that, why, I thought maybe the Jury would bring in a verdict for the defendant. [305]

Mr. Talbot: But your Honor earlier instructed them as follows: "If you find that the defendants have not proven by a preponderance of the evidence that the actual loss of the airplane was caused by the overloading, then you must find for the plaintiff on this defense," and later your Honor instructed the Jury that they must "determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane arose

from, and was the result of, a failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority," and again, "If you find that the loss of the airplane arose from, or was the result of, plaintiff's failure to obtain a specific written waiver from the CAA, and if you find that the plaintiff did not obtain an express written consent of Farwest General Agency, then you must find for the defendants on this defense."

Now, it seems to me that the Court is telling the Jury with regard to each one of these defenses, (1) they must find a causal relationship between the breach of the policy and the crash and (2) that they don't have to; and it seems to me to be possible that the jury found that the plane was in fact overloaded in violation of regulations but that the overloading did not cause the crash—and following your Honor's earlier instructions, brought in a verdict for the plaintiff.

Now I genuinely believe that there is a conflict in [306] the instructions here on this business of causal relationship that is so totally complete that the issue of overloading ought to be submitted to another jury.

Thank you.

Mr. Nesbett: If your Honor please, that is the very point that I drew your Honor's attention to at the time we were discussing the instructions. I felt that the defendants were not entitled to the instruction that Mr. Talbot just mentioned and that is, that there need be no causal relationship between

the crash and the overloading because it's my contention that there need be—there must be.

As I went back to the exceptions, the exclusions and the general conditions here, your Honor, it only draws to mind the argument that I was making at the time we were discussing the instructions and that is, that the case that Mr. Talbot relies on, the line of cases, such as Bruce against the Lumbermen's Insurance Company, dealt with exceptions to the policy saying "where it is made an exception in the policy, there need be no causal relation between the loss and the exception." The Bruce case dealt with explosives. Explosives were specifically mentioned in the policy and every case that followed the Bruce against the Lumbermen's doctrine dealt with an exception in the policy, your Honor—every case. Now, you don't have this matter dealt with in exceptions at all. The exceptions are up at the top of the page here [307] (indicating), where it—the exception—the loss or damage caused by frost, corrosion and such. Counsel, in the exclusions—now, you would ordinarily consider an exclusion means what it says here (indicating): "This certificate does not cover the following items" —they're excluded. It isn't mentioned there. You have to go down in the General Conditions to find the general clause that gives Mr. Talbot's argument any support or basis in this policy. So, I say, the Bruce against the Lumbermen's case does not apply here. This was not an exclusion. It was under the General Conditions—the first part of the argument.

Now, if you take the main part of his argument—

that is, that the plane was engaged in an unlawful purpose or that the flight was for an unlawful purpose—he asks your Honor to find, as a matter of law because of these regulations and ICC restrictions, that it was an unlawful purpose. Now, your Honor, I don't see how that matter could have been submitted to the jury more plainly than your Honor submitted it in the instruction. Your Honor took what law there was available on purpose, the definition of the word purpose and one of them was a Circuit Court of Appeals case that I quoted from in my proposed instruction which your Honor gave where purpose was the idea of the Court. They wanted to define purpose and those exact words were [308] used by your Honor. We took "purpose" from Webster's dictionary and gave it to the jury and then told the jury this plane concededly was flying dynamite from Iliamna Bay to Big Mountain. Here are the definitions of "purpose" from the best sources we could find them. "Do you think that the purpose of this flight was unlawful," and they said "no." How could it have been submitted any fairer, I would like to know, than that? Now, that is the only exclusion, your Honor, the only exclusion that Lloyd's is relying on because it's No. 4 in the General Exclusions, and remember there's exceptions up here before the exclusions—exceptions, not exclusions—and they exclude a flight for an unlawful purpose and that's how your Honor instructed the jury.

All right. So then for the rest of the argument you have to be concerned with the General Condi-

tions with the exception of the argument on waiver which comes under General Exclusions, but a different paragraph because there, the paragraph that Mr. Talbot is relying on says, "any loss or damage or liability arising from," which specifically relates to the wording in paragraph one—back to the heading of the paragraph—"arising from," and then it says, any flying which is done without a waiver where a waiver should have been obtained. All right; just for the moment, your Honor, assume that this order S-712 [309] didn't apply to Alaska. I don't concede that at all. Assume for the moment it didn't. We'll say, all right, Cordova Airlines was carrying dynamite. They should have had a waiver from the Civil Aeronautics Administration. They did not have such a specific waiver. Now, read the heading or the preface to the paragraph: "Any loss, damage or liability arising from any flying where a waiver should have been obtained and was not obtained"—arising from—the result of, cause of, any loss resulting from, cause of, any flying done without a waiver.

Admittedly, the dynamite didn't explode. The dynamite didn't cause this crash. It could have been loaded with turnips or anvils or anything else. So, was carrying the dynamite without a waiver—did the loss arise from that? No. In any event, the jury was given the right to decide that question, too, and we are using the—their own contract wording. They devised this policy. "Arising from"—that's simple enough—"arising from" or the result of any flying done without a waiver where a waiver should have

been obtained; otherwise, why didn't they use "aris"—why did they use "arising from"? Why didn't they say "this policy does not include any flying done without a waiver"; but they said, "any loss or damage or liability arising from." There, you have the requirement that there must have been a causal relation [310] between the loss and the failure to get the waiver. So, entirely apart from S-712, the jury must have found, and I think they were properly instructed on that point, that the loss was because they did not get a waiver, or the result of, cause of. There must have been causal relation there because the policy says so.

This is not the Bruce case where it says this policy does not cover the carriage of explosives in your truck, to a trucking line, and the trucking line carried explosives. Any way, the word explosives, of course, is not even mentioned in this policy.

All right, now the overloading. I think that the matter of overloading was handled too leniently in favor of the defendants because I think that being in the General Conditions and a question of fact that the jury must first have found, first, whether or not the plane was overloaded. If they found the plane was overloaded then the next question was, did the overload cause the crash?

Thirdly, and your Honor denied me this, and I was using as a basis the Ninth Circuit Court of Appeals case in the Eglestar Insurance Company—your Honor will remember those two decisions where the Court had its trouble making up its mind. Thirdly, I thought I was entitled to an instruction

with regard to due diligence [311] because, your Honor, Paragraph 3 here, your Honor denied me any instruction on that—Paragraph 3 in the General Conditions which said "the assured shall use due diligence and do and concur in doing all things reasonable and practicable to avoid any loss or damage." Now, that means something. It was put in the policy for a reason, but I didn't get any instruction on that although I requested some. So, my argument and my proposed instruction provided that if the jury finds there was an overload they must then next find, did the overload cause the crash? If it did, then, lastly, did Cordova—were they negligent in allowing a situation like that to arise? In other words, were they negligent in not having instructed Haley, indoctrinated him, issued blanket orders to all their pilots not to overload or—in some fashion were negligent because that clause was put in that policy for a meaning. It had some meaning in this situation, but I never got the benefit of that in my instruction and I objected at the time, your Honor, and I felt I was entitled to it sincerely and in the Ninth Circuit Court of Appeals cases that was considered. They construed due diligence in doing all things reasonably and practicable as amounting to a warning to the assured.

Now, you must not be negligent in permitting any violation of the Operations Limitations. I think I was [312] wronged in these instructions more than the defendant was. I don't think the defendant was entitled to the instruction on causal relationship that he got and I objected to it and I

think that if the jury found in our favor it's all the more reason to believe that under the wording of these Exclusions and General Conditions that we were entitled to have found in our favor.

Now, just a word, your Honor, with respect to S-712. Mr. Talbot lays some emphasis on the preamble to that order. It was designed for shipments of dynamite, apparently, that for some particular reason were funneling out of Tucson, Arizona, and, as the wording of the preamble, was to almost any military airport or construction site in the United States. Well, the Act says "United States" means Alaska, but I was relying, and others relied as Smith said on the stand, on the wording of the order. There is the meaning of it. Of course, they had a local situation in mind when they made the order and they recited it as a reason for making an order, but the order itself is what speaks. It contemplates dynamite belonging to the Air Force and we stipulated in this case that the dynamite here did belong to the Air Force. By contract, anything Morrison-Knudsen acquired became the property of the U. S. Air Force the moment it was acquired. [313]

The order contemplated that the flights would be made by chartered craft. This craft was chartered. Mr. Talbot says "exclusive." I don't contend that the order, in portion, says that it must be exclusive at all. Possibly in some cases in the United States where there are large cities and they're flying in and out, they want the control tower provisions within that order, too, and arrangements made with

local municipal officials. Well, none of that applied here in this particular instance. You have no control tower. You had none of the aspects of—they wanted in the order in case they were applicable in large congested populated centers, but, here we had Air Force dynamite. We had a chartered plane. We had a defense project. We had the dynamite and it was being flown to an Air Force field. It was construed by many people, Smith said, his company to be a blanket authority, but we don't have to rely on that. We don't have to rely on it because, as I pointed out, the matter of unlawful purpose under the exception was handled fairly, put to the jury, and it couldn't have been put in a plainer manner and they decided in favor of the plaintiff.

Your Honor, what purpose a new trial could serve I cannot possibly see. A judgment notwithstanding the verdict would certainly be unwarranted under any theory or reasoning, and I think, if anything, in the wording [314] of their own contract, the defendants received an instruction highly more favorable to their case than they were entitled to and the plaintiff was deprived entirely of any benefit of the wording of Paragraph 3 of the General Conditions.

Mr. Talbot: Your Honor, I feel obliged to correct Mr. Nesbett in one or two minor details in reply. His recollection of the Bruce case is mistaken. Explosives had nothing to do with the Bruce case. The Bruce case involved whether or not a small plane carried parachutes and both the District Court and the Court of Appeals found that the

carrying, or the non-carrying, of the parachutes would have had absolutely nothing to do with the crash or with the damage and loss of life which resulted, but they held that the policy should be enforced in accordance with its plain meaning.

It's true that the Bruce case does rely upon a Supreme Court case in which explosives were involved, but the opinion of the Bruce case is applicable here. We don't care whether or not—for the purposes of this lawsuit, we don't care whether or not the overloading caused the crash or the failure to get permission from Farwest General Agency caused the crash or the fact that the purpose of the flight was unlawful. Now, it's undisputed that the purpose of the flight was to move a quantity of dynamite [315] from Iliamna Bay to Big Mountain. Mr. Pollock's letter, which is Exhibit B and was received without objection, states it in so many words, speaking for Morrison-Knudsen, that the purpose was to move the dynamite. There is no dispute there. The only question is whether or not that was a lawful purpose in view of these regulations and whether admitted facts are lawful or unlawful it seems to us is a question of law for the Court and not a question of fact for the jury because the facts were admitted.

Now, the policy says "unlawful purpose." It doesn't say "immoral purpose," as Mr. Nesbett would read. We concede that it was useful and beneficial to get this dynamite from Iliamna Bay to Big Mountain. If it had been done lawfully, then the plane would have been used for a lawful pur-

pose and we think that that is all that is involved.

Now, on reading the General Exclusions I think Mr. Nesbett left out a phrase which must be included: "General Exclusion 1 (c)." I read as follows: "This Certificate does not cover any loss, damage or liability arising from the use of the aircraft * * *" (repeating) "arising from the use of the aircraft for any flying in which a waiver issued by the Civil Aeronautics Authority is required," and so forth. And it is the use of the aircraft which is prohibited and excluded and the same is true of [316] the wording of General Exclusion No. 4.

Now, we did not stipulate that this dynamite belonged to the U. S. Air Force. We stipulated that it was property of the United States Government. Whether that makes a difference or not I cannot say, but for matters of fact it was deemed by the parties "Government dynamite." But Regulation 712, your Honor, the word "dynamite" does not appear anywhere in that regulation and I think Mr. Nesbett is seriously mistaken in thinking that the CAB had before it any question having to do with commercial dynamite. In fact, they say "security-classified explosives" and we don't rely on the preamble part of that order although it's extremely illuminating to the Court in getting at what the CAB intended, but one can cut that order in half right above the order provision and it doesn't change any of the quotations which I read to your Honor which were all from the order part. The Air Force is given permission to carry classi-

fied explosives in aircraft chartered specifically for that purpose exclusively in fact for that purpose where the Air Force certifies that it's a proper shipment in accordance with CAB regulations and the carrier provides a hand-to-hand signature service.

Now, those are the order portions of the regulation within which the Plaintiff must bring itself.

The Court: I instructed the jury several [317] times during the trial that their duty was to evaluate and determine the facts and I had nothing to do with the determination of the facts. They had to take the law from the Court and the Court was not going to interfere in any way from their determination of the facts.

Now, one of the questions presented to the jury was whether or not the plane was overloaded. That is a question of fact. I can't substitute my opinion for the opinion of the jury.

Another question presented to the jury is whether or not the airplane was used for an unlawful purpose. I might have thought it was used for an unlawful purpose but the jury—that is a question of fact. I submit it to the jury; the jury decided it wasn't used for an unlawful purpose.

Then there was another question: Whether or not the regulation gave blanket authority. They were told about the regulation. The regulation was given to them and they had it before them. It was a question of fact for them to decide.

I think this is a question of fact for the jury and even though it—if I had been trying the case without a jury I might have come to a different

conclusion. Nevertheless, I can't substitute my opinion for the opinion of the jury. Consequently, the motions must be denied and [318] they are so denied.

Will you prepare the order?

Mr. Nesbett: Yes, your Honor.

Mr. Talbot: Could your Honor advise me whether or not a judgment has been entered in this case? I haven't received any notification from the Clerk.

The Court: I think it has. We've got a cost bill; we wouldn't have a cost bill before we had a judgment, would we? (Pause.) Let's see——

Mr. Nesbett: 12th of June, your Honor, I think it was.

The Court: Yes, the judgment was signed and filed on June 12th.

Mr. Talbot: Thank you.

The Court: You know, down our way unless their documents are approved as to form we have to hold them five days so that it will give opposing counsel an opportunity to object to the form of the order and to the order itself. I held this for five days and I never had any notice of any objections although I understand the objections were filed but they were never brought to my attention, so——

Mr. Talbot: No objections were filed as to the form of the judgment, your Honor.

The Court: Well, your motion was made and——

Mr. Talbot: Yes, sir. [319]

The Court: So, I held it, but I think this is a question of fact for the jury and the jury determined adversely and I can't set it aside and I am

quite sure that attorneys generally, regardless of whether they're on the losing side or not, would like the Court to be consistent in the ruling that when the jury decides a fact not to interfere with it. It's very, very unsatisfactory for an attorney, after submitting questions of fact to the jury, to have some Court come along and change the conclusions on them, and it's very discouraging sometimes, so I am just sorry, but I just can't find any merit in your motions.

They will be denied.

The Court will now stand in recess until twenty minutes after 2:00.

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of proceedings on appeal of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on May 29, June 2, 3, 4 and 20, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed November 18, 1958. [320]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding. No designation of record having been filed.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 12th day of June, 1958.

Dated at Anchorage, Alaska, this 13th day of November, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10

(1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceedings as designated by counsel for the Defendant-Appellant, including Transcript of Proceedings and Exhibits.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, San Francisco 1, California, from Judgment filed and entered in the above-entitled cause by the above-entitled court on the 12th day of June, 1958.

Dated at Anchorage, Alaska, this 10th day of December, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE SUPPLEMENTAL ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and of Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, and the additional designation of record on appeal by counsel for Plaintiff-Appellee, I am transmitting

herewith additional Original Papers in my office dealing with the above-entitled cause.

The original papers herewith transmitted are to supplement and become a part of the original papers transmitted to the United States Court of Appeals, Ninth Circuit, San Francisco, California, on the 10th day of December, 1958.

Dated at Anchorage, Alaska, this 12th day of December, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 16283. United States Court of Appeals for the Ninth Circuit. Underwriters at Lloyd's of London, Victoria Insurance Company, Ltd., Orion Insurance Company, Ltd., and Eagle Star Insurance Company, Ltd., Appellants, vs. Cordova Airlines, Inc., Appellee. Transcript of Record. Appeal From the District Court for the District of Alaska, Third Division.

Filed: November 17, 1958.

Docketed: December 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 16308

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Executors,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

WILLIAM L. KUMLER,
WILSON B. COPES,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 16308

IN THE

United States Court of Appeals

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Petitioner,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Tax Court is reported at 30 T. C. No. 98 and at pages 27-43 of the Transcript of Record. References to the opinion herein will be to the pages of the Transcript.

Jurisdiction.

The petition for review [Tr. 45] involves Federal income taxes for the calendar years 1949-1952 both inclusive. Petitioner is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased. Mary Jane Little, who died on or about September 10, 1953, a resident of Los Angeles County, State of California, filed her Federal income tax returns for the years here

involved in the office of the Collector of Internal Revenue (or District Director of Internal Revenue) at Los Angeles, California. [Tr. 19.]

On July 1, 1955, petition was filed in the Tax Court of the United States (Docket No. 58688) for redetermination of deficiencies in tax asserted by respondent. [Tr. 3.] Decision of the Tax Court was rendered July 21, 1958. [Tr. 5.] The cause comes to this Court upon petition for review filed September 30, 1958. [Tr. 5.] Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

Questions Presented.

The ultimate issue presented by this appeal is whether decedent, Mary Jane Little, was entitled to claim a portion of certain deductions for depreciation and depletion allowable for the taxable years here involved, under subsections 23(l) and 23(m) of the Internal Revenue Code of 1939[1] or, whether the trustee of a testamentary trust of which decedent was a life income beneficiary, was entitled to claim the entire amount of such deductions.

The questions presented arise from the Tax Court's interpretation and application, under stipulated facts, of two identical sentences appearing in the cited subsections. Each provides that "in the case of property held in trust the allowable deduction shall be apportioned between the income beneficiary and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allowable to each."

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[1]All section references herein are to the Internal Revenue Code of 1939 unless otherwise noted.

The subsections of the Internal Revenue Code establish precise rules for the apportionment of the allowable deductions. They are either:

(1) To be apportioned in accordance with the pertinent provisions of the *instrument creating the trust,* or

(2) Absent such pertinent provisions, they are to be apportioned on the basis of the *trust income* allocable to income beneficiaries and trustee respectively.

Although the Tax Court properly found as a fact that "the will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust" [Tr. 30], it held that the entire amounts of such deductions were allowable only to the trustee. To reach this conclusion the Tax Court went outside the provisions of the will, *i.e.,* the "instrument creating the trust." Resorting to the provisions of an instrument to which the testatrix was in no sense a party, it held that the testamentary trust must be regarded as modified by a trust agreement entered into by various beneficiaries in settlement of differences between them respecting their own interests in the testamentary trust estate.

The Tax Court's decision gives rise to the following subsidiary questions of law.

(1) What is meant by "pertinent provisions of the instrument creating the trust" as those words are used in subsections 23(l) and 23(m) of the Internal Revenue Code?

(2) Where the provisions of a testamentary trust confer an unqualified discretion on the trustee thereof to determine "what portion of receipts of the estate shall be allocated to corpus of the estate, and what portion of

such receipts shall be allocated to income of the estate," does a contractual undertaking by such trustee, in an instrument to which the testatrix was not a party, that the trustee will exercise its discretion in accordance with provisions of a Texas statute, have the effect, as a matter of Federal income tax law, of incorporating the provisions of the Texas statute in "the instrument" creating the testamentary trust?

(3) Did the trust agreement entered into by the beneficiaries of the testamentary trust modify the instrument creating the latter or did it, in legal effect, only provide for the future disposition of the personal interests of such beneficiaries in the trust estate?

(4) Even assuming that the answer to (2) above is affirmative, do the provisions of the Texas statute have the effect of apportioning *deductions* for Federal income tax purposes between income beneficiary and trustee or do such provisions have the effect of apportioning *trust income* between income beneficiary and trustee?

(5) Where no mention thereof is made by a testatrix in her will creating a testamentary trust, does the fact that during her lifetime her books and records covering oil operations showed regular, consistent charges for depreciation and depletion constitute an implied provision in such will that federal income tax deductions for such items be apportioned to the trustee in the face of specific provisions in the will that trust income was to be apportioned to income beneficiaries and corpus as the trustee in its unqualified discretion might determine?

Statute and Regulation Involved.

These are set out in the Appendix, *infra*.

Statement.

The facts in the case below were all stipulated as set forth in the Stipulation of Facts [Tr. 19-25] and documentary exhibits referred to therein. There is no dispute as to what the facts are but only as to their legal significance.

Except for certain omissions, which petitioner regards as important, the Tax Court's statement of the primary facts is accurate and will be adopted as petitioner's statement of facts. Where additions to the Tax Court's statement are made by petitioner herein, such additions will be indicated as follows: "(Par. added by petitioner)."

Mary Jane Little died on or about September 10, 1953, a resident of Los Angeles County, California. Decedent filed her Federal income tax returns for the years 1949, 1950 and 1951 with the then Collector of Internal Revenue, and for the year 1952 with the District Director of Internal Revenue for the sixth district of California, Los Angeles, California. The Bank of America National Trust and Savings Association is the duly appointed and acting executor of the Estate of Mary Jane Little, deceased. [Tr. 19.]

Decedent was the mother of Gloria D. Foster, who died on or about July 30, 1943, a resident of Dallas County Texas. For many years prior to her death, Gloria conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death in 1943 she owned undivided interests in approximately 84 producing oil wells in this field and in the physical equipment used

in connection therewith. The oil income distributed to Mary Jane Little as beneficiary of the Gloria D. Foster Trust during the years here involved (from which depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties. [Tr. 20.]

The last will and testament of Gloria D. Foster, deceased, [Ex. 5-E] was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. [Tr. 20.]

The will named L. C. Webster, Sol Goodell and T. A. Knight executors. After providing for a few specific bequests of cash and personal effects, the residue of Gloria's property was devised and bequeathed to L. C. Webster, T. A. Knight and Sol Goodell as trustees. The trust provisions of the will are contained in Article "V" and in this portion of the will said trustees were given broad authority and discretion in connection with the management of the corpus, investments and reinvestments. Paragraph 2 of Article V of the will provided, in part, that the "decision of trustees as to what property is corpus and what property is income of [the] estate, shall be final and binding on all parties at interest hereunder. * * * "

Paragraph 5 of Article V of the will also grants the trustees unqualified discretion in allocating trust receipts to income or corpus. (Par. added by petitioner.)

The will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust. Paragraphs 8 and 9 of Article V of the will provided as follows:

8. Out of the net income of my estate I direct that Two Hundred ($200.00) Dollars per month shall be paid to my faithful servant, Eva Culbertson, during her life-

time, and One Hundred ($100.00) Dollars per month shall be paid to my mother-in-law, Mrs. Jeremiah Foster, during her lifetime and thereafter to my sister-in-law, Evelyn Foster, during her lifetime. All other net income from my estate shall be paid to my mother, Mary Jane Little, during her lifetime. If during any calendar year after the calendar year during which I die, while my mother is alive, the net income so paid my mother is less than Twelve Thousand ($12,000.00) Dollars, I direct that at the end thereof trustees pay to her the difference out of the corpus of my estate if she so requests.

9. This trust shall terminate on the date of the death of my mother, Mary Jane Little. On termination of this trust, I direct that all the estate and properties constituting it that are then in the hands of trustees shall pass and vest in fee simple and by trustees shall be conveyed.

(a) one-half to Ann Armstrong Knight, if she then be living, and to her heirs *per stirpes* if she then be dead; and

(b) one-half to Marian Ralston Knight, if she then be living, and to her heirs *per stirpes* if she then be dead. [Tr. 29-30.]

The trustees named in the will accepted the trust and allocated to the corpus of the trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion as was equal to the amount of depreciation and depletion allowable for Federal income tax purposes with respect to such income. [Tr. 20.]

Decedent, Mary Jane Little, proposed to institute proceedings to contest Gloria's will dated April 19, 1943, relying upon the validity of a prior will dated September 8,

1942. For the purpose of settling the threatened will contest a Contract and Agreement, dated September 20, 1944, was entered into by and between the interested parties. [Ex. 6-F.] The Contract and Agreement provided, in part, as follows: (a) that the purpose of the "contract and agreement is to settle, adjust and compromise all matters in issue or controversy between any and all of the parties hereto;" (b) that the trustees named under Gloria's will (dated April 19, 1943) were to resign as trustees, and others were to be appointed; (c) a trust agreement was to be entered into by all beneficiaries under the will, with changes in the power and duties of the new trustees, and with changes in the rights of the beneficiaries.

Under Section II, heading 16 of the Contract and Agreement of September 20, 1944 [Ex. 6-F], the parties to the dispute confirm and agree to the validity of Gloria D. Foster's will dated April 19, 1943 and to the validity of the probate thereof, further agreeing to defend against any attack upon the will. The testamentary trust was thus recognized as valid for all purposes. (Par. added by petitioner.)

Under the trust agreement which was to be entered into pursuant to the Contract and Agreement of September 20, 1944, the corpus of the testamentary trust under the will was not transferred to the trustee under the trust agreement. Instead the interests, *in futuro,* of the remaindermen of the testamentary trust were to be transferred to said trustee. [Ex. 6-F, Sec. II, heading 6.] (Par. added by petitioner.)

[In lieu of the paragraph in the Tax Court's opinion beginning at the bottom of Tr. p. 31 and ending near the bottom of Tr. p. 32 petitioner submits the following more complete summary of the pertinent portions of the trust agreement referred to therein.]

The trust agreement referred to in the Contract and Agreement of September 20, 1944, was executed by certain beneficiaries of the testamentary trust under date of November 14, 1944. [Tr. 21; Ex. 7-G.] First Parties thereunder were the remaindermen under the testamentary trust. Second Party was Mary Jane Little. Third Party was the Mercantile National Bank at Dallas. (Par. added by petitioner.)

Section I, paragraph 1, of the trust agreement of 1944 recites that First Parties have executed and delivered to the Third Party, as trustee all *their* right, title and interest in the estate of Gloria D. Foster, deceased, vesting or to vest in them under her will of April 19, 1943, except for minor specific bequest items. (Par. added by petitioner.)

Section I, paragraph 4, of the trust agreement of 1944 states:

> "The will grants to the trustees thereunder broad discretion in determining what portion of receipts of the estate shall be allocated to corpus of the estate, and what portion of such receipts shall be allocated to income of the estate, and Third Party in the exercise of such discretion hereby undertakes to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will." (Par. added by petitioner.)

Section II, paragraph 1, of the trust agreement of 1944 describes the character of the trust therein established as follows:

> "1. The trust created under the aforesaid will of Gloria D. Foster, deceased, will terminate on the

death of Second Party, and it is the intention of the parties hereto that thereupon Third Party shall hereunder come into the possession of and hold legal title to all the estate and properties constituting the net corpus of the trust created under said will at the date of termination of said trust that are then in the hands of trustee under said will." (Par. added by petitioner.)

Section II, paragraph 2 of the trust agreement of 1944 provided that prior to the death of Second Party, the trustee was to hold naked legal title to the interests conveyed to the trustee by First Parties. (Par. added by petitioner.)

The trust agreement of 1944 was executed by the parties. The old trustees under the will resigned and were succeeded by the Mercantile National Bank at Dallas. [Tr. 31.] (Par. added by petitioner.)

After the death of Mary Jane Little, and providing that neither she nor her assignees, heirs, representatives or any person claiming through her attacked the Gloria D. Foster will, then under the new trust agreement one-half of the then corpus of the trust was to be distributed to Ann Armstrong Knight and Marian Knight Rowe in equal shares, or to their heirs *per stirpes,* and the other half of the then corpus of the trust was to be distributed to the heirs, representatives, legatees or assigns of Mary Jane Little. [Ex. 7-G, Sec. II, par. 12.]

On September 30, 1947, a suit was brought in the district court of Dallas County, Texas, by L. C. Webster, Sol Goodell and T. A. Knight, as independent executors of the Estate of Gloria D. Foster, deceased, against Mercantile National Bank at Dallas, as successor trustee of the Estate of Gloria D. Foster, deceased; Mary Jane

Little, Talbot Shelton, and Wharton E. Weems, as owners of one-half of the remainder interest in the estate; J. R. Bower, Jr., Ann Knight Bower, Frederick E. Rowe, Jr., and Marian Knight Rowe, as owners of the other half of the remainder interest in the estate. In their petition [Ex. 8-H(1)] plaintiffs alleged that during the course of their administration they, as executors, had received proceeds from the sale of oil and gas from properties of the estate up to December 1, 1946, at which date the Mercantile National Bank at Dallas commenced collecting such proceeds; that they, as executors, had allocated to the corpus of the estate amounts representing "cost" depletion on oil produced and sold, together with depreciation on facilities, equipment, furniture, fixtures and the like, in accordance with practices employed by decedent, Gloria D. Foster, during her lifetime; that they, as executors, set forth such allocations of proceeds to corpus in their final account filed with the court, and they prayed that the court construe the will, particularly with reference to the meaning of the term "net income" as used therein, so as to approve their final account and to instruct them respecting the matter of what portion of funds in their hands represented net income and what portion was corpus and to discharge them from further liability and responsibility as executors. [Tr. 32-33.]

In their answer [Ex. 8-H(2)] the defendants Ann Knight Bower, J. R. Bower, Jr., Marian Knight Rowe and Frederick E. Rowe, Jr., interposed a cross-action wherein they alleged that the issue of proper allocation of the proceeds of sale of oil and gas between income and corpus after December 1, 1946 by Mercantile National Bank at Dallas, trustee, was also in controversy as between themselves and Mary Jane Little and her assignees. The cross-complainants requested declaratory relief to the ef-

fect that the Mercantile National Bank at Dallas, trustee, be ordered to compute and allocate to corpus depletion based on cost or 27½ per cent, whichever was greater, plus depreciation based on the methods used by decedent, Gloria D. Foster, during her lifetime. The court, by decision dated December 13, 1948 [Ex. 8-H(15)], ordered, adjudged and decreed that L. C. Webster, Sol Goodell and T. A. Knight, as executors of the Estate of Gloria D. Foster, deceased, had properly computed depletion and depreciation and allocated correct and proper amounts to corpus for depletion and depreciation as shown by their final account. The court specifically found, in paragraph VIII of its decision, as follows:

In determining the "net income" of decedent's estate, defendant, Mercantile National Bank at Dallas, as Successor Trustee of the Estate of Gloria D. Foster, deceased, in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction, is authorized, required and directed to charge and set aside to corpus reserves for depreciation on oil and gas lease equipment and machinery, and depletion, in the following manner:

(a) Depreciation: A reserve for depreciation on the oil and gas lease equipment and machinery belonging to said estate, commencing December 27, 1946, to be computed in the same manner and according to the same formula as the decedent did during her lifetime and as plaintiffs have done as shown by their final account, which reserve for depreciation shall be deducted from the proceeds

of sales of runs of oil and gas produced by said estate subsequent to December 1, 1946, and set aside to corpus.

(b) Depletion: Out of the proceeds of oil and gas runs produced and sold and to be produced and sold from each oil and gas lease subsequent to December 1, 1946, compute, charge and set aside to corpus 27½% of the gross proceeds of such sales of runs from each lease (but not to exceed 50% of the net income from such lease after deducting the expense and carrying charges on such lease, including depreciation, but not including depletion). [Ex. 8-H (15).]

Consistent with its judgment the court decreed that of the $43,091.91 in custody of the executors, $42,379.96 represented corpus of the Estate of Gloria D. Foster, deceased, and $711.95 was net income of said estate. The executors, having previously paid the former sum to Mercantile National Bank at Dallas, trustee, and the latter to Mary Jane Little, deceased, were discharged and acquitted of all other claims arising out of their administration. [Tr. 35.] Mary Jane Little excepted to the judgment of December 13, 1948, in open court, and gave oral notice of appeal, but this appeal was not perfected by her and the judgment became final. [Tr. 23.]

Sproles & Woodard, certified public accountants, were the accountants who kept the books and records of Gloria D. Foster and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here in-

volved. The books of Gloria D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with the standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August 1943 to December 1946, and thereafter the trust has used "percentage" depletion. Deductions for depletion and depreciation were claimed in the Federal income tax returns, throughout, consistent with the books of Gloria D. Foster, and, later, the books of her estate and trust. [Tr. 23.]

In filing income tax returns for the Gloria D. Foster Trust, for the years here involved, the trustees computed and claimed as deductions the full amounts of allowable depletion and depreciation as follows:

Year	Depletion Claimed	Depreciation Claimed
1949	$47,011.47	$2,809.01
1950	47,348.24	2,552.21
1951	52,486.87	3,934.42
1952	52,478.44	4,205.44

Mary Jane Little, deceased, in her income tax returns for the years here involved, claimed a share of the deductions for depletion and depreciation allowable in respect of income of the Gloria D. Foster Trust. This share was computed as follows:

Mary Jane Little—1949
Fiduciary Income
Gloria Foster Trust, Mercantile National Bank, Dallas, Texas

I.	Net Income of Trust for 1949 per Spriles [sic] and Woodard		$ 92,128.02
	Deducted in Determining Net Income:		
	Depletion	$ 47,011.49	
	Depreciation	2,809.01	49,820.50
	Net Income before depletion and depreciation		$141,948.52
	Distributed to Mary J. Little in 1949	$ 77,601.94	
	Additional Amount distributable	10,926.08	
	Total distributable to Mary J. Little 1949	$ 88,528.02	$ 88,528.02
	Percentage of total distributable to Mary J. Little		62.3663%

II. Allocation of Income and of Deductions for Depletion and Depreciation

	Taxable Net Income Before Deductions	Deductions	Taxable Net Income
Mary Jane Little 62.3663%	$88,528.02	$31,071.20	$57,456.82
Other beneficiaries 2.5361%	3,600.00	1,263.50	2,336.50
Trust 35.0976%	49,820.50	17,485.80	32,334.70
Total 100%	$141,948.52	$49,820.50	$92,128.02

III.	Taxable to Mary Jane Little before Expense	$57,456.82
	Less Legal Expense	1,602.09
	Net Taxable	$55,854.73

A similar computation was made for each of the years 1950, 1951 and 1952, except for differences in the percentage of total distributable to Mary J. Little, deceased, in each of those years. [Exs. 10-J, 11-K, 12-L, 13-M.]

It will be observed that in her tax returns Mary Jane Little claimed as deductions a portion of the total allowable deductions based upon the portion of net income of the testamentary trust (before such deductions) which was allocable to her.

The trustee claimed the entire amount of deductions for depreciation and depletion allowable under subsections 23-(l) and 23(m) of the Internal Revenue Code. Respondent, Commissioner of Internal Revenue, approved the deductions claimed by the trustee and disallowed the portions thereof claimed by Mary Jane Little, asserting deficiencies in income tax against Mary Jane Little for the years 1949-1952, both inclusive. [Tr. 12.]

The Tax Court sustained respondent's treatment of the deductions, holding that the "testamentary trust, as modified by a later trust agreement, constitutes the 'instrument creating the trust' within the provisions of subsections 23(l) and 23(m) of the Internal Revenue Code of 1939." [Tr. 27.]

Specification of Errors.

1. The Tax Court erred in sustaining respondent's assertion of deficiencies in income taxes against Mary Jane Little for her taxable years 1949-1952 both inclusive, and in sustaining respondent's disallowance of the deductions for depletion and depreciation claimed by her for such years.

2. The Tax Court erred in holding that the provisions of the trust agreement of November 14, 1944, entered

into by beneficiaries of the testamentary trust under the will of Gloria D. Foster, had the legal effect of modifying the provisions of the testamentary trust and in further holding that as so modified the provisions of the testamentary trust constitute the "instrument creating the trust" within the provisions of subsections 23(l) and 23(m) of the Internal Revenue Code of 1939.

3. The Tax Court erred in holding that incorporation by reference in the trust agreement of November 14, 1944, of the provisions of a Texas statute, had the legal effect of incorporating such statutory provisions in the "instrument creating the trust."

4. The Tax Court erred in holding that the provisions of the Texas Trust Act, Acts 1943, 48 Legis., p. 232, ch. 148, amount to a provision of the trust instrument directing the apportionment of the allowable deductions for depreciation and depletion between income beneficiaries and trustee.

5. The Tax Court erred in holding that the decree of the District Court of Dallas County, Texas in 1948, directing the trustee to allocate portions of the proceeds of sale of oil and gas to income and to corpus, had the effect for Federal income tax purposes of incorporating in the instrument creating the trust a provision apportioning the entire amounts of deductions for depreciation and depletion to the trustee.

Summary of Argument.

A summary of petitioner's argument is presented by the following points of law.

I.

Apportionment of Federal income tax deductions for depreciation and depletion between income beneficiaries and trustees of a testamentary trust is controlled by the provisions of the will creating the trust, if any, and if there be no such provisions, on the basis of the trust income allocable to each.

(a) Provisions of subsections 23(l) and 23(m), Internal Revenue Code and background.

(b) The instrument creating the trust was the will of Gloria D. Foster, not the trust agreement of 1944, to which the testatrix was not a party. The will contained no pertinent provisions apportioning the deductions within the provisions of subsections 23(l) and 23(m). The grant by the will to the trustees of authority to allocate trust receipts to income or to corpus in their uncontrolled discretion does not constitute a directive to apportion deductions under "pertinent provisions of the instrument creating the trust." Testatrix' method of bookkeeping during life does not constitute a directive in her will to apportion the deductions.

(c) As used in subsections 23(l) and 23(m) the term "trust income" means net income after all other deductions but before deductions for depreciation and depletion. The apportionment of deductions made in her returns by Mary Jane Little was in accordance with the provisions of subsections 23(l) and 23(m) of the Internal Revenue Code.

II.

The provisions of the trust agreement of 1944 to which the testatrix was not a party, cannot be read into the testamentary trust so as to incorporate therein, by agreement of the beneficiaries, provisions for the apportionment of deductions under the Federal income tax statute. The trust agreement of 1944 was not the instrument creating the trust; nor did it supersede the testamentary trust so as to cause the new trust to become the trust the deductions for which were to be apportioned. The clear directive of a Federal income tax statute cannot be altered by agreement of the beneficiaries of a testamentary trust. The contractual undertaking of the trustee of the testamentary trust did not constitute a directive in the instrument creating the trust to apportion deductions for Federal income tax purposes.

III.

The decree of the state court of Texas, directing the trustee to apportion trust receipts by setting aside to corpus amounts representing depreciation and depletion, did not, as the Tax Court held, have the effect of incorporating such directive in the instrument creating the trust for Federal income tax purposes.

(a) The Texas Court's decree was based upon the trust agreement of 1944 and not upon the will of Gloria D. Foster. Any other construction of its effect would violate the Texas statute.

(b) The Texas Court by decree could not control the allowability of Federal income tax deductions under the circumstances of this case. For purposes of applying subsections 23(l) and 23(m) of the Federal income tax statute the decree of the Texas Court had the effect of apportioning trust income rather than deductions for depreciation and depletion.

ARGUMENT.

POINT I.

Apportionment of Federal Income Tax Deductions for Depreciation and Depletion Between Income Beneficiaries and Trustee of a Testamentary Trust Is Controlled by the Provisions of the Will Creating the Trust, if Any, and if There Be No Such Provisions, on the Basis of the Trust Income Allocable to Each.

(a) Provisions of Subsection 23(l) and 23(m), Internal Revenue Code and Background.

After providing generally for the allowance of deductions for depreciation and depletion from gross income, subsections 23(l) and 23(m) of the Code prescribe precise rules for their apportionment between the income beneficiaries and trustee of a trust. The applicable sentences in both subsections are identical and read:

> "In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."

A brief analysis and some discussion of the background of these sentences will be helpful in applying them to the facts of this case.

At the outset the language commands that the deductions shall be apportioned in accordance with the *pertinent provisions* of the *instrument creating* the trust. It then provides that if such *pertinent provisions* are absent, the deductions shall be apportioned on the basis

of *trust income* which is *allocable* to each. The key words, therefore, are:

pertinent provisions
instrument creating
trust income
allocable

The Conference Committee report of the 70th Congress, set forth in the Appendix hereto, and the Commissioner's regulations which adopt verbatim the language of part of the Committee report both reflect the Congressional mandate that the apportionment of the deductions is to be made "in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively."

Such language admits of reference to no instrument other than that which creates the trust which produces the trust income against which the deductions are allowable. The choice of providing or not providing a directive with respect to the apportionment of such deductions is conferred only upon the testator or trustor whose instrument *creates* the trust. There is no approval, expressed or implied, of the incorporation of such a directive in the provisions of the trust by any *person* other than the creator of the trust, nor by any *instrument* other than that which *creates* the trust.

Certain of these words have been given judicial attention in what are surprisingly few decided cases, but to our knowledge the instant case presents the first occasion on which a Court has been called upon to decide whether the provisions of an instrument to which the person

creating a trust was not a party can be read into the instrument whereby such trust was created.

The question whether "pertinent provisions" were contained in the instrument creating the trust was considered by the Board of Tax Appeals in *William Fleming, Trustee* (1941) 43 B. T. A. 229, affmd. C. C. A. 5 (1941) 121 F. 2d 7, where distribution of income was entirely within the discretion of the trustee. The Board said:

> "The question here is whether the petitioner, trustee, is entitled to deduct the entire depreciation and depletion that may be allowed on the trust income for the taxable year where the pertinent provisions of the trust instrument do not direct whether the trustee or the beneficiary shall take the deduction, and the distribution of the income is placed *entirely in the discretion of the trustee.* The respondent claims that under section 23(l) and (m) of the Revenue Act of 1934 allowance for depreciation and depletion must be divided, in the absence of *specific trust provisions,* between the trust and the beneficiary on the basis of the amount of income distributed and retained in that year. The petitioner contends that, properly interpreted, the statute awards the allowance only to those to whom the trust income is 'allocable' under the trust instrument and that in the present case the income was in the first instance allocated entirely to the trustee. Distributions made thereafter in his discretion, argues the petitioner, do not alter this result. (Emphasis ours.)
>
> "The statute when properly read in the light of the circumstances attendant on its enactment does not support petitioner's view. Prior to the Revenue Act of 1928 it was held in the case of a trust, the

income of which was currently distributable, that the allowance for depreciation and depletion might not be deducted by the beneficiary but only by the trust, even though it retained no income against which the deduction might be applied. See *United States v. Blow,* 77 Fed. (2d) 141; *Charles F. Grey,* 41 B. T. A. 234, 242. The following provision was thereupon added to section 23(k) and (l) of the Revenue Act of 1928 and made applicable to both depletion and depreciation deductions:

> "'In the case of property held in trust the allowable deduction [for depreciation and depletion] shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provision, on the basis of the trust income allocable to each.'

"The purpose of this change in the law was to eliminate the 'considerable hardship' which was imposed on the beneficiaries under prior law and to secure to them their fair portion of these allowances in proportion to the income distributable to them. See Senate Report No. 960, Revenue Act of 1928, (70th Cong., 1st sess.) p. 20. See also *Sue Carol,* 30 B. T. A. 443, 447, 448; *Sada G. Wilson Blake,* 39 B. T. A. 793.

"The force of these facts in the instant case requires the apportionment of the allowance here in question between the trust and the beneficiary. The single factor which stands out against it is the uncontrolled power in the trustee to determine the amount of income to be distributed in any year. This placing of the trust income under the control of the trustee does not, however, constitute the allocation contemplated by the statute."

In affirming the Board of Tax Appeals the Circuit Court of Appeals specifically observed that the trust instrument granted the trustee "uncontrolled discretion" in the distribution of net income and found no provision in the instrument *requiring* the allocation of any part of trust income or depletion.

The petitioner on appeal argued that the grant of discretion to him amounted to a direction in the instrument permitting him to allocate depletion to himself, as trustee, and having done so the entire deduction was allowable to the trustee. The Circuit Court disagreed, saying:

> "The provision of the Act *requiring* the apportionment of depletion on the basis of the *trust income* allocable to the beneficiary was intended to apply to such situations. The act is mandatory. The fact that the trustee distributed part of the *trust income* to the beneficiary in each of the taxable years here involved conclusively shows that the income distributed was allocable within the meaning of the Act." (Emphasis ours.)

The Circuit Court could not have reached that conclusion of law had it regarded the grant of uncontrolled discretion to the trustee as a *pertinent provision* of the instrument *directing* the apportionment of the depletion deduction.

Some three years later the Seventh Circuit Court of Appeals had occasion to examine the meaning of the expression of the words "pertinent provisions" in *Commissioner v. Netcher* (1944), 143 F. 2d 480. In presenting the issue the Court said at page 485:

> "There was no express provision for a depreciation reserve in the will, but the will did provide:

"'* * * It being my wish that said real estate * * * shall be held together for the benefit of my entire estate and the beneficiaries thereunder. * * *'"

Admitting that it was put to some struggle to find the above language sufficient to constitute a direction to apportion depreciation deductions to the trustee, the Circuit Court affirmed such a finding in a prior Board of Tax Appeals case *(Newbury v. Commissioner* (1932), 26 B. T. A. 101) even though the Tax Court, in the case *then* before the Circuit Court, had changed its interpretation of the same will and found the same language insufficient.

What is important here is the language of the Circuit Court with respect to the "instrument creating" the trust. The Court said at page 486:

> "In the instant situation, the statute was amended to provide for the use of the depreciation deduction in a contingency where the will *specifically* provides for the depreciation deduction, and also where it fails to so provide. It follows, therefore, that both the Commissioner and the courts *must turn to the will to first determine whether it so provides.* The statute in no way sets up criteria to determine whether a will does or does not so provide." (Emphasis ours.)

The term "trust income" as used in subsections 23(l) and 23(m) can have no acceptable meaning other than net income *before* deductions for depreciation and depletion. It is not the equivalent of "net income" for to adopt such a view would permit the allowance of a double deduction for such items. Statutory "net income" means gross income after all deductions of every kind. (Section 21, I. R. C.) If net income were allocated by a trustee and

thereafter a portion of the deductions already taken by the trustee were apportioned to the income beneficiary, its deduction from the beneficiary's share of "net income" would constitute a double deduction.

Petitioner's view in this regard is supported by the decision of the Board of Tax Appeals in the *Fleming* case, *supra* (p. 231), and the Tax Court in *Fred A. Hubbard, Apartments Trust* (1951) (Mem. Dec.) 10 T. C. M. 25.

(b) The Instrument Creating the Trust Was the Will of Gloria D. Foster, Not the Trust Agreement of 1944 to Which the Testatrix Was Not a Party. The Will contained No Pertinent Provisions Apportioning the Deductions Within the Provisions of Subsections 23(l) and 23(m).

The instrument which created the trust which produced the trust income here in question was the will of Gloria D. Foster, dated April 19, 1943. [Ex. 5-E.] The Tax Courts opinion clearly recognizes this. [Tr. 38.]

The Tax Court also found that "the will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust." [Tr. 30.]

By the quoted finding of fact the Tax Court concedes that it could discover no provision *in the will itself* which expressly or specifically constituted a direction to the trustee to apportion out of trust income deductions for depreciation or depletion.

Nor does the Tax Court attempt to find in the will a direction to apportion the allowable deductions to the trustee *via* the provisions of the will giving the trustee uncontrolled discretion to allocate trust receipts to income

or to corpus. Presumably, in this matter, the Tax Court recognizes the rules expressed by the Board of Tax Appeals and the Fifth Circuit Court of Appeals in *Fleming, supra,* and by the Tax Court in *Hubbard, supra,* which hold that the grant by an instrument of such broad discretion does not constitute for purpose of the Federal tax statute a direction to apportion deductions but rather to allocate trust income. The difference, of course, is controlling.

The Tax Court makes a somewhat half-hearted attempt to discern an intent on the part of the testatrix that the trustee provide reserves for depreciation and depletion by a reference to her practice in that regard during her lifetime. [Tr. 43.] It is undeniable, however, that what the testatrix did in keeping her books during her lifetime was one thing, and what she declined to do in her will was quite another. What the Federal tax statute required was that she provide *specifically* for the apportionment of the deductions in her will if she desired it to have that effect. That she did not do so and, quite the contrary, granted uncontrolled discretion to her trustees to decide whether or not to do so is a conclusive indication that she did not intend to provide for any fixed method of apportionment.

This view gains force from the fact that the *Fleming* case involved a Texas trust and was decided in 1941. It must be assumed that her counsel in advising her on the matter were aware of the decision. Further, by odd coincidence, Section 26, of the Texas Trust Act (set forth in part in the Appendix hereto) which became effective on the same day testatrix signed her will, April 19, 1943, provided in part:

> "* * * and the person establishing the principal may himself direct the manner of ascertainment of

> income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this Act."

The Tax Court's finding of a testamentary direction to the trustee to maintain depreciation and depletion reserves from the manner in which testatrix kept her books during life is wholly at odds with what she did, with the cited portion of the Texas Trust Act, and with the clear command of the Federal tax statute. Neither the testatrix' method of bookkeeping nor those of the trustee constitute the pertinent provisions required by the statute. The trustee in the *Fleming* case before the Board of Tax Appeals made a similar argument and was rebuffed in the following words:

> "The argument of the petitioner consists principally in a request that the allowance here in question be governed by his bookkeeping practice, but, against what we deem the plain direction of the statute, his position may not be sustained." (Op. p. 234.)

From the foregoing it is clear that for the purpose of applying subsections 23(l) and 23(m) the instrument creating the testamentary trust contained no provisions directing the apportionment of deductions between income beneficiaries and trustee. To find such provisions the Tax Court was compelled to go outside the will.

(c) As Used in Sections 23(l) and 23(m) the Term "Trust Income" Means Net Income After All Other Deductions but Before Deductions for Depreciation and Depletion. The Apportionment of Such Deductions Made in Her Returns by Mary Jane Little Was in Accordance With Those Subsections of the Internal Revenue Code.

It is significant that subsections 23(l) and 23(m) employ the expression "trust income allocable to each" and *not* "net income allocable to each." Under the Internal Revenue Code the latter term has a precise significance and means "the gross income computed under Section 22, less the deductions allowed by Section 23." (1939 I. R. C., Sec. 21.) Since the statute refers to "trust income" rather than "net income," what is meant by the former?

The question was before the Tax Court in *Fred A. Hubbard Apartments Trust* (Dec. 18076 (M)) 10 T. C. M. 25. The issue was whether the trustee was entitled to the full amount of depreciation allowable on trust property for its fiscal year 1945. The trustee there, as here, contended that the broad powers of management conferred upon it by the trust instrument authorized it to set aside depreciation and hence the entire depreciation deduction could be claimed by the trustee. Respondent contended that there was nothing in the trust instrument "which may reasonably be construed as *directing* the trustee to keep the trust corpus intact by reserving depreciation upon it." (Emphasis ours.) (Op. p. 24.) Respondent after first disallowing the deduction in its entirety subsequently conceded that an allocation of the depreciation deduction

should be made as between trustee and beneficiaries as follows:

Fiscal Year 1945.

(1) Gross income	$18,203.85
(2) Operating expense	7,978.53
(3) Net income before depreciation	10,225.32
(4) Depreciation allowed	2,175.01
(5) Balance of net income	8,050.31
(6) Amount distributed	3,902.50
(7) Amount withheld	$ 4,147.81

The sum of (4) and (7) is $6322.82.

Depreciation was apportioned thus:

$$\frac{6322.82 \times 2175.01}{10225.32} = \text{Depreciation allocable to Trustee}$$

In its opinion (p. 28) the Court referred to "trust income" as being $10,225.32, *i.e.,* gross income after all other charges except depreciation, and approved apportionment on the above basis. In applying this formula the Court said:

> "To distribute the income to the bondholders means the same thing as to allocate income to them within the meaning of section 23(l) in the absence of any *express direction* in the trust instrument as to the handling of depreciation." (Emphasis ours.) (Op. p. 29, citing *Fleming, supra.*)

From the language of the Tax Court in the *Hubbard* case it is apparent that petitioner here correctly computed the amounts of depletion and depreciation apportionable to her and that her returns were correct as filed.

II.

The Provisions of the Trust Agreement of 1944 to Which the Testatrix Was Not a Party, Cannot Be Read Into the Testamentary Trust so as to Incorporate Therein, by Agreement of the Beneficiaries, Provisions for the Apportionment of Deductions Under the Federal Income Tax Statute.

The trust agreement of 1944 was not the instrument creating the trust; nor did it supersede the testamentary trust so as to cause the new trust to become the trust the deductions for which were to be apportioned. The clear directive of a Federal income tax statute cannot be altered by agreement of the beneficiaries of a testamentary trust. The contractual undertaking of the trustee of the testamentary trust did not constitute a directive in the instrument creating the trust to apportion deductions for Federal income tax purposes.

The basic error of law made by the Tax Court is expressed in the following two conclusions:

> "The Foster will trust was modified by the trust agreement of 1944 and it is the Foster will trust as so modified in 1944 that is the 'instrument creating the trust' under which petitioner received the income during all of the years (1949 to 1952, inclusive) that are before us. * * *" [Tr. 40.]
>
> "The trust agreement of 1944, by reference to 'the law applicable at the time,' in paragraph 4, makes the foregoing statutory law of Texas a part of the agreement. It amounts to a provision of the trust instrument directing the apportionment of the allowable deductions between the income beneficiaries and the trustee, and the apportionment must be made in accordance with such provisions." [Tr. 41.]

The Federal tax statute refers specifically to the "instrument *creating* the trust." It does not refer to provisions of the trust generally, nor to provisions of instruments modifying or otherwise dealing with the trust or the interests of beneficiaries of the trust.

The legislative history, the Commissioner's regulations and the cases all construe the words "instrument creating the trust" as conferring the right to direct or refrain from directing the apportionment of deductions upon the *creator* of the trust. Here that person was Gloria D. Foster.

In the opinion of the Circuit Court in the *Netcher* case the following significant expressions appear:

> "The construction of the will can not be made to turn on its belated effect on the income of a beneficiary of a subsidiary trust." (Op. p. 487.)
>
> "No subsequent statute or tax situation can effect, much less change, the intention of the long deceased testator."

The clear intendment of these remarks is that the testator of a testamentary trust, or the trustor of an *inter vivos* trust alone possesses the statutory right to provide for the apportionment of deductions in the "instrument creating" a trust.

The same Court further suggests that an attempt, even by a proposal for legislation, to extend the right of apportionment to persons other than the creator of the trust might well meet with Congressional refusal by reason of the possibilities of abuse inherent in such situations. (Op. p. 488.)

It requires little effort to imagine the opportunities for tax avoidance afforded by an interpretation of subsections 23(l) and 23(m) which would permit high and low surtax bracket beneficiaries, or tax exempt beneficiaries such as charities, to apportion the deductions among themselves by agreements which *modify* the instrument creating a trust. It must be assumed that Congress advisedly limited the right to direct apportionment of such deductions to the narrow confines of the instrument or document which brings the trust into existence.

The interpretation here given the words "instrument creating the trust" by the Tax Court violates the principle expressed by the Seventh Circuit Court and would open the door to such very abuses.

The Tax Court concedes that the trust agreement of 1944 did not create the trust but modified it. We submit that in legal effect it did no such thing for Federal income tax purposes.

The trust agreement of 1944 [Ex. 7-G], was an agreement whereby, in order to settle their claims against the estate of Gloria D. Foster, the claimants agreed:

(1) To recognize the validity of the will of Gloria D. Foster dated April 19, 1943. [Ex. 6-F, Sec. II, heading 16.]

(2) The trust under the will was recognized as valid and existing and the *remaindermen agreed* to transfer their *future interests* to a trustee, Mercantile National Bank at Dallas. [Ex. 6-F, Sec. II, heading 6; Ex. 7-G, Sec. I, par. 1.]

(3) The parties agreed that prior to the termination of the trust created by the will, the trustee under the trust agreement of 1944 should hold naked title to the interests of the remaindermen under the testamentary trust. [Ex. 7-G, Sec. II, pars. 1 and 2.]

(4) After the death of Mary Jane Little, the properties constituting the testamentary trust estate were to be conveyed not to the remaindermen named in the will but to the trustee under the trust agreement of 1944 who would thereafter:

(a) Distribute one-half to the remaindermen named in the will and one-half to the heirs, representatives, legatees, or assigns of Mary Jane Little, *providing* neither she nor any one claiming through her had attacked the will.

(b) If such attack *were* made, then the entire trust estate was to be distributed to the remaindermen named in the will. [Ex. 7-G, Sec. II, par. 12.]

(5) In exercising the broad discretion granted by the will to the trustee *thereof* to allocate trust receipts to income and corpus, said trustee "undertakes to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by the will." [Ex. 7-G, Sec. I, par. 4.]

Far from being a modification of the "instrument" creating the testamentary trust, the trust agreement of 1944, established a naked trust, of which the corpus consisted of the future interests of the remaindermen under the will. These interests the trustee agreed to hold to secure the parties against further attack upon the will.

Though the trust of 1944 had a *res* it was to have no trust estate until the death of Mary Jane Little.

True, the trustee under the testamentary trust *agreed* to exercise its broad discretion in a certain way, *i.e.*, in accordance with the provisions of the Texas Trust Act at the time. But such an agreement made with the several beneficiaries, was not and could not be a modification of the provisions of the testamentary trust. Actually, it constituted nothing more under *either* local or Federal income tax law, than an agreement to allocate *trust income* to income and corpus. The testatrix, Gloria D. Foster, was not a party to the trust agreement of 1944 and the trustee's *own* undertaking, contractually made, cannot in any sense be said to have been pursuant to her direction in the will. The provisions of the instrument *creating* the testamentary trust remained unchanged. Only the *future* interests of the remaindermen and the heirs, legatees, etc., of Mary Jane Little were to be altered.

A careful examination of the trust agreement of 1944 reveals that it did not even purport to modify the will; it was to become effective as a practical matter only after the testamentary trust had terminated. By a side agreement set forth in the trust agreement of 1944 the beneficiaries of the testamentary trust authorized the trustee thereof to *exercise* its discretion in an agreed manner.

Is one to suppose that the decision in *Fleming, supra,* would have been different if the trustee and the beneficiary there had *agreed* that the trustee might set aside reserves for depletion? We think not.

III.

The Decree of the State Court of Texas, Directing the Trustee to Apportion Trust Receipts by Setting Aside to Corpus Amounts Representing Depreciation and Depletion, Did Not, as the Tax Court Held, Have the Effect of Incorporating Such Directive in the Instrument Creating the Trust for Federal Income Tax Purposes.

After the trust agreement of 1944 had been entered into by the beneficiaries of the testamentary trust under Gloria D. Foster's will, a suit was brought by L. C. Webster, Sol Goodell and T. A. Knight as independent executors of the Estate of Gloria D. Foster, deceased. The substance of the issues presented and decree of the Texas court in that suit are set forth in the Tax Court's opinion [Tr. 32-36] and in the statement of facts *ante*. Petitioner has no quarrel with the Tax Court's statement of the facts respecting the suit in the Texas court but submits that the Texas court's decree did not have the legal effect which the Tax Court here gave it.

The Tax Court held:

> "There, the court determined the 'net income' must be determined 'in accordance with the law applicable to said estate at this time' and it in effect stated the applicable law was a direction to the trustee to allocate all depreciation and depletion to the trust." [Tr. 42.]

From the Texas court's decision the Tax Court takes reinforcement for "our view that the settlement agreement and the new trust agreement in 1944 must be considered as an integral portion of the instruments creating the trust." [Tr. 42.]

The effect of the Tax Court's holding is that the decree of the Texas court, directing the trustee to apportion

to corpus trust receipts equivalent to amounts allowable as deductions for depreciation and depletion, incorporated that direction into the instrument creating the trust with the legal consequence, for Federal income tax purposes, that it thereby constituted a pertinent provision of that instrument, apportioning the allowable deductions to the trustee. This, we submit, is erroneous on several grounds.

(a) The Texas Court's Decree Was Based Upon the Trust Agreement of 1944 and Not Upon the Will of Gloria D. Foster. Any Other Construction of Its Effect Would Violate the Texas Statute.

Gloria D. Foster's will was the instrument which brought the testamentary trust into being. That instrument did not contain the direction of the testarix required by the Federal tax statute. Indeed, under its specifically expressed provisions, uncontrolled discretion was conferred upon the trustees thereof to allocate trust receipts to income or corpus as they saw fit. Under Section 26 of the Texas Trust Act such grant of discretion was not only proper but "shall control notwithstanding this Act."

To hold, as did the Tax Court, that the Texas court's decree took authority for the direction from the testatrix will, would do patent violence to the Texas statute.

The Texas court, therefore, could not properly have derived authority for its decree from either the will alone, or the will as construed under the Texas statute, but could properly have done so from the trust agreement of 1944 which *contractually* incorporated the provisions of Section 33 of the Texas Trust Act in the trust agreement by reference. As we have seen, *ante,* that instrument was not the document which created the testamentary trust.

(b) The Texas Court by Decree Could Not Control the Allowability of Federal Income Tax Deductions Under the Circumstances of This Case. For Purposes of Applying Subsections 23(l) and 23(m) of the Federal Income Tax Statute, the Decree of the Texas Court Had the Effect of Apportioning Trust Income Rather Than Deductions for Depreciation and Depletion.

By whatever authority outside the will the Texas court had the power to direct the testamentary trustee to charge the trust receipts and set aside to corpus, reserves for depreciation and depletion, its decree could not control the allowance of deductions therefor for Federal income tax purposes. It is settled that "state law may control in taxing matters only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."

Goodwin's Estate v. C. I. R. (1953), 201 F. 2d 576, 580;

Gallagher v. Smith (1955), 223 F. 2d 218, 222.

"Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."

Lyeth v. Hoey (1938), 305 U. S. 188, 194; 59 S. Ct. 155, 83 L. Ed. 119.

In subsections 23(l) and 23 (m) Congress established as the condition for apportionment of deductions solely to the trustee that provision therefor be specifically set forth in the instrument *creating* the trust. Congress likewise prescribed that where such provisions are not so set forth in that instrument the deductions shall follow allocations of trust income to beneficiaries and trustee respectively.

Then, even though the Texas court, under local law, might properly have directed the trustee to set aside to corpus, out of trust receipts amounts to cover depreciation and depletion reserves, its decree had the effect under subsections 23(l) and 23(m) only of directing the allocation of "trust income" between income beneficiaries and trustee respectively. The decree of the Texas court was not a direction by the testatrix, nor did it purport to be such by its terms. Since, as the Seventh Circuit Court of Appeals has held, the Commissioner and courts must look to the will to find the necessary direction, and Gloria D. Foster's will, by the Tax Courts' own finding, made no mention of such direction, the Texas court could not, for the purposes before us, supply it.

Conclusion.

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,

WILLIAM L. KUMLER,

WILSON B. COPES,

Attorneys for Petitioner.

APPENDIX.

INTERNAL REVENUE CODE OF 1939:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(1) Depreciation.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

* * * * * * * *

(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but

not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

REGULATIONS 111:

Sec. 29.23(1)-1.

Depreciation. —* * * In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee. For

deduction with respect to the amortization of emergency facilities, in lieu of the deduction for depreciation, see sections 23(t) and 124.

REPORT—CONFERENCE COMMITTEE.

70th Cong., 1st Sess., H. Rept. 1882.

Amendment No. 30: Under existing law difficulty has been experienced in determining and allowing the deduction for depreciation in cases where property is held by one person for life with remainder to another person; and the deduction, in the case of property held in trust, is allowable only to the trustee. The Senate amendment provides that a life tenant, for the purpose of this deduction, shall be considered as the absolute owner; so that he will be entitled to the deduction during his life, and that thereafter the deduction, if any, will be allowed to the remainder man. In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee. The bill contains similar provisions as to the deduction for depletion. The

Senate amendment provides for an equitable apportionment of the deduction in these cases; and the House recedes.

TEXAS TRUST ACT.

[Ch. 148—General and Special Laws—Texas 48th Legislature—Reg. Sess. 1943 (pp. 232-247), Effective April 19, 1943.]

Sec. 26. Right of trustee to determine principal and income.

This Act shall govern the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal, provision may be made touching all matters covered by this Act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this Act.

Sec. 27. Income and principal—disposition.

* * * * * * * *

c. All income after deduction of expenses properly chargeable to it, including reasonable reserves, shall be paid and delivered to the tenant or retained by him if already in his possession or held for accumulation where legally so directed by the terms of the transaction by which the principal was established; while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law.

Sec. 31. Principal used in business.

When principal is used in business, the net profits and any increase or decrease in the principal shall be allocated as follows:

* * * * * * * * *

c. Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such a way as to decrease the principal.

Sec. 33. Disposition of natural resources.

Where any part of the principal consists of any interest in lands, including royalties, over-riding royalties, and working interest, from which may be taken timber, minerals, oil, gas, or other natural resources and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal or trust was established to sell, lease, or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as extension payments on a lease or bonus of consideration for the execution of the same, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be apportioned to principal and income as follows:

Such percentage thereof as is permitted to be deducted for depletion under the then existing laws of the United States of America for federal income tax purposes shall be treated as principal and invested or held for the use and benefit of the remainderman, and the balance shall be treated as income subject to be disbursed to the tenant or person entitled thereto, or if no provision for such de-

duction for depletion is made by the then existing federal income tax laws, then twenty-seven and one-half (27½%) per cent of the net proceeds thereof each year shall be treated as principal and invested or held for the benefit of the remainderman and the balance shall be treated as income and subject to be disbursed to the tenant or person entitled to such income. Such disposition of proceeds shall apply whether the property is producing or non-producing at the time the trust becomes effective.

[Ch. 77—General Laws—Texas 49th Legislature—Reg. Sess. 1945 (pp. 109-114).]

Sec. 9. Section 26 of Senate Bill No. 251, Acts of 1943, 48th Legislature, Chapter 148, is hereby amended so that the same shall hereafter read as follows:

Section 26. Right of Trustee to Determine Principal and Income.

This Act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remainderman in all cases where an express trust has been created; except that in the establishment of the principal, provision may be made touching all matters covered by this Act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this Act.

Sec. 10. Section 33 of Senate Bill No. 251, Acts of 1943, 48th Legislature, Chapter 148, is hereby amended so that the same shall hereafter read as follows:

Section 33. Disposition of Natural Resources.

Where any part of the principal consists of any interest in lands, including royalties, overriding royalties, and working interest, from which may be taken timber, minerals, oil, gas or other natural resources, and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal or trust was established to sell, lease, or otherwise develop such natural resources, and no provision is made for the disposition of the proceeds thereof, such proceeds, if received as delay rentals on a lease shall be deemed income, but if received as consideration, whether as bonus or consideration for the execution, of the lease or as royalties, overriding or limited royalties, oil payments or other similar payments, received in connection with the physical severance of such natural resources, shall be apportioned to principal and interest as follows: 27½% of the gross proceeds (but not to exceed 50% of the net, after deducting the expenses and carrying charges on such property) shall be treated as principal and invested or held for the use and benefit of the remainderman, and the balance shall be treated as income subject to be disbursed to the tenant or person entitled thereto. Such disposition of proceeds shall apply whether the property is producing or non-producing at the time the trust becomes effective.

No. 16308

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Executor*, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

HOWARD A. HEFFRON,
Acting Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 27-43) is reported at 30 T.C. 936.

JURISDICTION

This petition for review (R. 45-47) involves federal income taxes for the years 1949 through 1952. The total deficiencies amount to $107,452.12. (R. 44.) On April 7, 1955, the Commissioner mailed to

the taxpayer notice of a deficiency in this total amount. (R. 10-15.) Within ninety days thereafter and on July 1, 1955 (R. 3), the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954 (R. 5-9). The decision of the Tax Court was entered on July 21, 1958. (R. 44.) The case is brought to this Court by a petition for review filed September 30, 1958. (R. 5, 45-47.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in holding that the taxpayer, a life income beneficiary of a trust, was not entitled to claim deductions for depreciation and depletion under Sections 23(l) and (m) of the Internal Revenue Code of 1939 with respect to oil and gas properties held as trust corpus, when under the terms of the trust under which she received the income, the amounts of the deductions were allocated to corpus.

STATUTE AND REGULATIONS INVOLVED

These may be found in the Appendix, *infra*.

STATEMENT

The facts were stipulated (R. 19-25) and were found accordingly (R. 28). As set out by the Tax Court, with certain additions supported by exhibits made a part of the record but not included by the Tax Court in its findings, they may be summarized as follows:

Mary Jane Little (referred to herein as the taxpayer) died on or about September 10, 1953, a resident of Los Angeles County, California. The Bank of America National Trust and Savings Association (referred to herein as the petitioner) is the duly appointed and acting executor of the estate of Mary Jane Little, deceased. (R. 28.)

The taxpayer was the mother of Gloria D. Foster, who died on or about July 30, 1943, a resident of Dallas County, Texas. For many years prior to her death Gloria conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death in 1943 she owned undivided interests in aproximately 84 producing oil wells in this field and in the physical equipment used in connection therewith. The oil income distributed to taxpayer as beneficiary of the Gloria D. Foster Trust during the years here involved (from which depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties. (R. 29.)

The last will and testament of Gloria D. Foster, deceased, was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. The will named L. C. Webster, Sol Goodell and T. A. Knight executors. After providing for a few specific bequests of cash and personal effects, the residue of Gloria's property was devised and bequeathed to L. C. Webster, T. A. Knight and Sol Goodell as trustees. The trust provisions of the will are contained in Article "V" and in this portion of the will the trustees

were given broad authority and discretion in connection with the management of the corpus, investment and reinvestments. Paragraph 2 of Article V of the will provided, in part, that the "decision of trustees as to what property is corpus and what property is income of [the] estate, shall be final and binding on all parties at interest hereunder. * * *" The will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust. (R. 29-30.)

Paragraphs 8 and 9 of Article V of the will provided as follows (R. 30-31):

> 8. Out of the net income of my estate I direct that Two Hundred ($200.00) Dollars per month shall be paid to my faithful servant, Eva Culbertson, during her lifetime, and One Hundred ($100.00) Dollars per month shall be paid to my mother-in-law, Mrs. Jeremiah Foster, during her lifetime and thereafter to my sister-in-law, Evelyn Foster, during her lifetime. All other net income from the estate shall be paid to my mother, Mary Jane Little, during her lifetime. If during any calendar year after the calendar year during which I die, while my mother is alive, the net income so paid my mother is less than Twelve Thousand ($12,000.00) Dollars, I direct that at the end thereof trustees pay to her the difference out of the corpus of my estate if she so requests.
>
> 9. This trust shall terminate on the date of the death of my mother, Mary Jane Little. On termination of this trust, I direct that all the estate and properties constituting it that are

then in the hands of trustees shall pass and vest in fees simple and by trustees shall be conveyed.

(a) one-half to Ann Armstrong Knight, if she then be living, and to her heirs per stirpes if she then be dead; and

(b) one-half to Marian Rolston Knight, if she then be living, and to her heirs per stirpes if she then be dead.

The trustees named in the will accepted the trust and allocated to the corpus of the trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion allowable for federal income tax purposes with respect to such income. (R. 31.)

Taxpayer, Mary Jane Little, proposed to institute proceedings to contest Gloria's will dated April 19, 1943, relying upon the validity of a prior will dated September 8, 1942. For the purpose of settling the threatened will contest a contract and agreement, dated September 20, 1944, was entered into by and between the interested parties. The contract and agreement provided, in part, as follows: (a) that the purpose of the "contract and agreement is to settle, adjust and compromise all matters in issue or controversy between any and all of the parties here"; (b) that the trustees named under Gloria's will (dated April 19, 1943) were to resign as trustees, and others were to be appointed; (c) a trust agreement was to be entered into by all beneficiaries under the will, with changes in the power and duties of the new trustees, and with changes in the rights of the beneficiaries. (R. 31.)

Under Section II, heading 16 of the Contract and Agreement, the parties confirmed and agreed to the validity of the will dated April 19, 1943, "Subject to the conditions being met that are set out under headings 2, 3, and 5 above". Those conditions were that a declaratory judgment be obtained that the bequests to Ann Armstrong Knight and Marian Ralston Knight were not subject to the spendthrift trust provisions of the will, that the trustees resign and Mercantile National Bank at Dallas be the sole successor trustee, and that a new trust agreement be entered into, which provided that one-half the remainder go to the heirs of the taxpayer. (Ex. 6-F.)

Under heading 6 of this Contract and Agreement the remaindermen were to convey their interests to the Mercantile National Bank; the latter was to become the sole successor trustee. (Ex. 6-F.)

The trust agreement was executed by all the beneficiaries under date of November 14, 1944, and the old trustees resigned and were succeeded by the Mercantile National Bank at Dallas. Instead of the broad powers of disposition under the trust created by the will, the new trustee (with specified exceptions) could not encumber or dispose of properties constituting corpus of the trust without the consent of the beneficiaries. In place of the former broad powers of reinvestment, the trustee under the new trust agreement was limited to investments in United States Government bonds, unless consent to invest otherwise was given by the beneficiaries. As contrasted with the broad discretion to determine "what portion of receipts of the estate shall be allocated to

corpus of the estate, and what portion of such receipts shall be allocated to income of the estate" granted to the trustees under the will, the new trustee under the trust agreement was "to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will". (R. 31-32.)

The foregoing, concerning the administration of the trust under the will of Gloria D. Foster, is set out in Section I of the Trust Agreement. Section II provides for a trust to be known as the Foster Trust, to be effective upon the death of the taxpayer and the termination of the trust under the will. The trust agreement contains provisions for the administration and termination of this second trust and for distribution of its corpus. (Ex. 7-G.)

On September 30, 1947, a suit was brought in the District Court of Dallas County, Texas, by L. C. Webster, Sol Goodell and T. A. Knight, as independent executors of the Estate of Gloria D. Foster, deceased, against Mercantile National Bank at Dallas, as successor trustee of the Estate of Gloria D. Foster, deceased; Mary Jane Little, deceased, the taxpayer; Talbot Shelton and Wharton E. Weems, as owners of one-half of the remainder interest in the estate; J. R. Bower, Jr., Ann Knight Bower, Frederick E. Rowe, Jr., and Marian Knight Rowe, as owners of the other half of the remainder interest in the estate. In their petition the plaintiffs alleged that during the course of their administration they, as executors, had received proceeds from the sale of oil and gas from

properties of the estate up to December 1, 1946, at which date the Mercantile National Bank at Dallas commenced collecting such proceeds; that they, as executors, had allocated to the corpus of the estate amounts representing "cost" depletion on oil produced and sold, together with depreciation on facilities, equipment, furniture, fixtures and the like, in accordance with practices employed by decedent, Gloria D. Foster, during her lifetime; that they, as executors, set forth such allocations of proceeds to corpus in their final account filed with the court, and they prayed that the court construe the will, particularly with reference to the meaning of the term "net income" as used therein, so as to approve their final account and to instruct them respecting the matter of what portion of funds in their hands represented net income and what portion was corpus and to discharge them from further liability and responsibility as executors. (R. 32-33.)

In their answer the defendants, Ann Knight Bower, J. R. Bower, Jr., Marian Knight Rowe and Frederick E. Rowe, Jr., interposed a cross action wherein they alleged that the issue of proper allocation of the proceeds of sale of oil and gas between income and corpus after December 1, 1946, by Mercantile National Bank at Dallas, trustee, was also in controversy as between themselves and Mary Jane Little and her assignees. The cross complainants requested declaratory relief to the effect that the Mercantile National Bank at Dallas, trustee, be ordered to compute and allocate to corpus depletion based on cost or 27½ per cent, whichever was greater, plus depreciation

based on the methods used by decedent, Gloria D. Foster, during her lifetime. (R. 33-34.)

Paragraph 11 of the taxpayer's answer in that proceeding (Ex. 8-H(6)) contained the following:

11.

This defendant denies the allegations contained in Paragraph 11 of plaintiffs' petition and in respect of the several corresponding subparagraph thereof alleges as follows:

(a) Plaintiffs, as executors, in the exercise of their alleged discretion, have retained, as corpus from the proceeds of the sale of oil and gas an amount equivalent to depletion computed on a cost basis as shown in their Exhibit B. This defendant, however, alleges that neither the will not the settlement agreement nor any of the exhibits mentioned therein contains any pertinent provision with respect to depletion, and that plaintiffs, as executors, were not vested with any discretion in respect of depletion or the apportionment of the proceeds of the sale of oil and gas between income and corpus, but instead were at all times bound to apportion such proceeds between income and corpus in accordance with the provisions of the Texas Trust Act applicable at the time, so that prior to April 11, 1945, they were required to apportion to corpus out of the net proceeds of the sale of oil and gas, after payment of expenses and carrying charges on such property, an amount equivalent to the amount permitted to be deducted for depletion under the then

existing laws of the United States of America for Federal income tax purposes, and after April 11, 1945, were required to apportion to corpus twenty-seven and one-half (27½) per cent of the gross proceeds from the sale of oil and gas (but not to exceed fifty (50%) per cent of the net, after deducting the expense and carrying charges on the property).

(b) Plaintiffs, as executors, were not entitled at any time to charge against income and to deduct therefrom, any amount for the depreciation of property used in the production of said oil and gas, because neither the will nor the settlement agreement nor any of the exhibits mentioned therein contains any pertinent provision with respect to depreciation, and that plaintiffs, as executors, were not vested with any discretion in respect of deducting depreciation or in the apportionment of the proceeds of the sale of oil and gas between income and corpus, but instead, the Texas Trust Act was at all times applicable and contained no provision authorizing any such deduction.

The court, by decision dated December 13, 1948, ordered, adjudged and decreed that L. C. Webster, Sol Goodell and T. A. Knight, as executors of the estate of Gloria D. Foster, deceased, had properly computed depletion and depreciation and allocated correct and proper amounts to corpus for depletion and depreciation as shown by their final account. (R. 33.) The court specifically found, in paragraph VIII of its decision, as follows (R. 34-35):

In determining the "net income" of decedent's estate defendant, Mercantile National Bank at Dallas, as Successor Trustee of the Estate of Gloria D. Foster, Deceased, in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction, is authorized, required and directed to charge and set aside to corpus reserves for depreciation on oil and gas lease equipment and machinery, and depletion, in the following manner:

(a) Depreciation: A reserve for depreciation on the oil and gas lease equipment and machinery belonging to said estate, commencing December 27, 1946, to be computed in the same manner and according to the same formula as the decedent did during her lifetime and as plaintiffs have done as shown by their final account, which reserve for depreciation shall be deducted from the proceeds of sales of runs of oil and gas produced by said estate subsequent to December 1, 1946, and set aside to corpus.

(d) Depletion: Out of proceeds of oil and gas runs produced and sold and to be produced and sold from each oil and gas lease subsequent to December 1, 1946, compute, charge and set aside to corpus 27½% of the gross proceeds of such sales of runs from each lease (but not to exceed 50% of the net income from such lease after deucting the expense and carrying charges on such lease, including depreciation, but not including depletion).

Consistent with its judgment the court decreed that of the $43,091.91 in custody of the executors, $42,379.96 represented corpus of the estate of Gloria D. Foster, deceased, and $711.95 was net income of

the estate. The executors, having previously paid the former sum to Mercantile National Bank at Dallas, trustee, and the latter to the taxpayer, were discharged and acquitted of all other claims arising out of their administration. Taxpayer excepted to the judgment of December 13, 1948, in open court, and gave oral notice of appeal, but this appeal was not perfected by her and the judgment became final. (R. 35-36.)

Sproles & Woodward, certified public accountants, were the accountants who kept the books and records of Gloria D. Foster and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here involved. The books of Gloria D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August, 1943, to December, 1946, and thereafter the trust has used "percentage" depletion. Deductions for depletion and depreciation were claimed in the federal income tax returns, throughout, consistent with the books of

Gloria D. Foster, and, later, the books of her estate and trust. (R. 36.)

In filing income tax returns for the Gloria D. Foster Trust, for the years here involved, the trustees computed and claimed as deductions the full amounts of allowable depletion and depreciation. Mary Jane Little, deceased, in her income tax returns for the years here involved, claimed a share of the deductions for depletion and depreciation allowable in respect of income of the Gloria D. Foster Trust. Taxpayer claimed that she was entitled to deduct a portion of the total allowable deductions for depletion and depreciation based upon the proportion of the net income of the estate (prior to such deductions) which was allocable to her. (R. 36-38.)

The Tax Court sustained the Commissioner's determination that the entire amounts were deductible by the trustee. (R. 42-44.)

SUMMARY OF ARGUMENT

I

Under the contract of settlement and the trust agreement of 1944, all parties claiming an interest in the estate of Gloria D. Foster by agreement drastically modified the trust provided in her will, and also provided for a later trust to become effective upon the death of the taxpayer. The terms of this later trust are irrelevant to the issues here, which concern the tax treatment of the income received by the taxpayer during her lifetime.

The agreement of 1944 specifically directed that allocation of receipts to corpus or to income be made

"in accordance with the provisions of law applicable at the time without regard to" the discretion granted by the will. Under the Texas Trust Act, as construed by the Texas Court, reserves for depletion and depreciation were to be allocated to corpus.

In a noncollusive, adversary proceeding, after considering evidence and argument, and determining both the facts and the law, the appropriate Texas court construed the trust as requiring the allocation to corpus of reserves for depletion and depreciation prior to the distribution of income. Its decision as to the provisions of the trust is controlling here.

II

Section 23(l) and (m) of the Internal Revenue Code of 1939 provide that in the case of property held in trust the allowable deductions for depreciation and depletion shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust.

The trust under which the property was held during the taxable years, and under the terms of which the income was paid to the taxpayer, was the "Foster will trust" modified by the trust agreement of 1944. The pertinent provisions of that instrument directed the allocation of the allowances to corpus.

The property was not held under the terms of the will, unmodified, nor did the taxpayer receive her taxable income under the original terms. Even if she had, however, those terms could be construed as carrying out an intent of the testatrix that the allow-

ances be allocated to corpus in the same manner. But the court below correctly held that "the trust" whose terms are to be considered was the modified trust.

ARGUMENT

I

The Texas Court's Decision Construing the Provisions of the Modified "Foster Will Trust" Was a Final Adjudication of the Rights of the Parties Thereunder and Is Controlling

The facts have been stipulated, and should not be in dispute. We are here concerned with the trust under the will of Gloria D. Foster, as modified by the contract and trust agreements in 1944.

However, the petitioner has introduced unnecessary confusion in the case by its emphasis on a later trust, not related to the years in controversy or to the tax issues here involved. The agreements under which the "Foster will trust" [1] was modified also provided for a later trust, to become effective upon the death of the taxpayer. This later trust is irrelevant to the present case, since it did not become effective during the taxable years involved, nor did its terms relate to the issues here. It is to this later trust that petitioner is referring when it states that the corpus of the testamentary trust was not transferred to the trustee under the agreement of September 20, 1944 (Br. 8), when it recites that the trustee was to hold naked legal title to the interests conveyed

[1] The term used in the opinion below. (R. 40.)

by the remaindermen prior to the death of the taxpayer (Br. 9-10), when it states that the agreement of 1944 did not supersede the testamentary trust "so as to cause the new trust to become the trust the deductions for which were to be apportioned" (Br. 19, 31), and when it recites, with apparent completeness, the provisions of the trust agreement (Br. 33-34).

For the sake of clarity, therefore, we summarize the facts relevant to the issue before this Court. The will of Gloria Foster gave the trustees discretion as to the management of the corpus, and also provided, in part, that the "decision of the trustees as to what property is corpus and what property is income of [the] estate, shall be final * * *." (R. 29.)[2] The taxpayer threatened to contest the will, and a contract and agreement was entered into in September, 1944, followed by a trust agreement in November, 1944, which created the new trust referred to above, and also modified the Foster will trust. (R. 31-32.) These agreements sharply limited the discretion of the trustees, removed the spendthrift provisions as to the remaindermen, and provided that the original trustees of the Foster will trust should resign and that Mercantile National Bank become the successor trustee. Heading 4 of Section I of the trust agreement of November, 1944 (Ex. 7-G) reads as follows:

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[2] The court below noted, but did not decide, that there is some question whether or not the will alone could be construed as requiring apportionment of depletion and depreciation to corpus. (R. 40, 43.)

> 4. The will grants to the Trustees thereunder broad discretion in determining what portion of receipts of the estate shall be allocated to corpus of the estate, and what portion of such receipts shall be allocated to income of the estate, and Third Party in the exercise of such discretion hereby undertakes to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will. Subject to the foregoing, Third Party, while acting as Trustee under said will, shall pay the net income of said estate to Eva Culbertson, Mrs. Jeremiah Foster or Evelyn Foster, and to Second Party in accordance with and under the terms and provisions of Section V of said will.

Under Section II, heading 16 of the Contract and Agreement, the parties confirmed and agreed to the validity of the will "Subject to the conditions being met that are set out under headings 2, 3 and 5 above." (Ex. 6-F.)[3]

The original trustees had allocated to corpus depletion and depreciation, in accordance with the practices employed by Gloria D. Foster in her lifetime. In 1947 they brought suit in the District Court, Dallas County, Texas, naming as parties the successor trustee, the taxpayer, and the remaindermen, requesting the court to approve their account and to construe the will and instruct them, particularly with reference to what amounts constituted income and what corpus. (R. 33.) There was a contest between the remaindermen and taxpayer as to the

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[3] Petitioner's statement (Br. 8) omits this qualification.

amount which should be set aside to corpus as depletion and depreciation. Taxpayer's position was that the executors could not charge against income any amount for depreciation, and were required to apportion to corpus an amount equal to the depletion deduction pursuant to the provisions of the Texas Trust Act. (Ex. 8-H(6).)

The court's decision (Ex. 8-H(15)) recites that it had heard the pleadings, the evidence and argument, and was determining the facts as well as the law. It adjudged that the executors had properly computed and allocated depletion and depreciation, held that the amounts so allocated were corpus and should be turned over to the successor trustee and that taxpayer (par. IV) "is not entitled to any part of said sum," approved the final account, and directed (par. VIII) that the successor trustee "in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction" should charge and set aside to corpus the reserves for depletion and depreciation.[4] Taxpayer's oral appeal from the decision was not perfected by her and the judgment became final. (R. 36.)

Petitioner argues that this court decision (1) was not a construction of the Foster will trust (Br. 37),

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[4] The pertinent provisions of law applicable at this time were embodied in the Texas Trust Act. General and Special Laws, Texas, 1943, c. 148, p. 232. As construed by the local court reserves for depletion and depreciation were to be allocated to corpus. See the Tax Court's opinion (R. 40-42) in this respect.

and (2) is in any event entitled to no weight (Br. 38).

Petitioner's arguments as to the first point appear to be that the agreement of 1944 was not intended to modify the testamentary trust as such, but was merely a collateral contract as to how the trustees should exercise their discretion to allocate trust receipts to income or corpus as they saw fit, and that the court was merely construing and enforcing this collateral contract. (Br. 37.) There is no support in the court's decision for any such distinction. So far as that decision indicates, the court was approving the actions of the plaintiffs and instructing the successor trustee under the terms of a single legal instrument incorporated in two documents, the will *as modified* by the 1944 agreement. Furthermore the argument that the 1944 agreement was no more than an incidental contract overlooks the fact that it drastically modified the original provisions of the Foster will trust, imposing severe limitations on the powers of the trustees, requiring the withdrawal of the trustees named in the will and designating another trustee, and cutting in half the interest of the remaindermen named in the will. It overlooks the fact that *only* as so modified was the validity of the will to be unchallenged. It is clear, therefore, that the parties to the agreement, including the taxpayer, and the Texas court regarded the 1944 agreement as an integral part of the terms of the Foster will trust.

As to petitioner's second argument, that the decision of the Texas court in construing the trust should be given no weight, we note first that there is no

suggestion that the decision was obtained by collusion, or by consent in a nonadversary proceeding, or was *pro forma*. There was a bona fide contest between adversary parties; the court's attention was directed to the specific contested question of the allocation of depreciation and depletion to corpus or to income; it heard evidence and argument; and it decided that question. It did not purport to determine the federal tax question; it did determine the terms and application of the Foster will trust.[5]

In so far as the first question involved is concerned—as to how under the trust the depletion and depreciation must be allocated, as concerns the parties to the trust—the Texas court decree is conclusive. *Freuler* v. *Helvering*, 291 U. S. 35, 44-47. The state court decree is binding "so far as it is found that local law is determinative of any material point in controversy." *Blair* v. *Commissioner*, 300 U. S. 5, 9. See also, *Gallagher* v. *Smith*, 223 F. 2d 218 (C. A. 3d). The state court decree is binding as to the meaning of the pertinent terms of the trust, particularly as to what are "the provisions of law applicable at the time" (R. 32, 34) with respect to how receipts shall be allocated between income and corpus.

With the state court decree conclusive as to the rights of the parties under the modified "Foster Will Trust," the federal question arises as to the tax consequences of the allocation. To that question we now turn.

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[5] Petitioner suggests (Br. 33) that there are possibilities of collusion to obtain tax avoidance if such agreements are approved, and that there are possibilities of abuse. This, however, is not such a case.

II

The Trust Under Which the Apportionment of Depreciation and Depletion Deductions Was Made and Under Which Income Was Paid To and Received By the Taxpayer as the Modified Trust Created By the Trust Agreement of 1944 and the Will

Both Section 23(l) of the Internal Revenue Code of 1939 (Appendix, *infra*), dealing with depreciation, and Section 23(m) (Appendix, *infra*), dealing with depletion contain the following provision:

> In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

This language first appeared in Section 23(k) and (l) of the Revenue Act of 1928, c. 852, 45 Stat. 791. Prior to that time, in situations where the trust instrument or local law did not require the setting aside of a reserve for depreciation or depletion, and the entire trust income was payable to the beneficiary, the latter did not receive the benefit of the allowance. The Senate Finance Committee report explained the effect of the new language as follows (S. Rep. No. 960, 70th Cong., 1st Sess. (1928), p. 20 (1939-1 Cum. Bull. (Part 2) 409, 423)):

> In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or,

> in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee. The bill contains similar provisions as to the reduction for depletion.

The language of the Conference Committee report is similar. H. Conference Rep. No. 1882, 70th Cong., 1st Sess. (1928) pp. 11-12 (1939-1 Cum. Bull. (Part 2) 444, 445). The applicable Treasury Regulations follow the language of these Committee Reports. Treasury Regulations 111, Sections 29.23(l)-1 and 29.23(m)-1; Treasury Regulations 118, Sections 39.23(l)-1 and 39.23(m)-1, Appendix, *infra*.

It is apparent that neither the Committee Reports nor the Regulations throw any direct light on the issue here, which is what is to be regarded as the trust instrument. Petitioner assumes throughout that the relevant trust is that originally created by the will of Gloria Foster, without subsequent modification, and accordingly discusses only the pertinent provisions of the instrument originally creating *that* trust. We submit, however, that "the trust" with which

the statute is concerned in this case is the *modified* trust arising from the trust agreement of 1944.

The statute is not limited to testamentary trusts. It applies to all trusts, however and whenever created. It is clearly intended to deal with whatever the trust may be under which the taxable income is received and the depletion and depreciation deductions are claimed. For the taxable years involved in the present case the income was received and allocations to income and corpus were made only under the modified trust arising out of the settlement and trust agreement of 1944.

To put it differently, although the petitioner argues as though there were but the original trust, analytically and chronologically there were three. The first was the trust provided in the will of Gloria Foster. The second was created in 1944, by agreement of all persons claiming an interest in the corpus.[6] This second, under which the income here taxed was paid and received, contained terms substantially different from those in the will, and the document confirmed the validity of the will only as so modified. The third trust, also created in 1944, was to become operative only on the death of the taxpayer.

Whether we consider the trust here in question as being a separate trust from the original one, or a modification of the original one, we cannot know what "the trust" was during the taxable years by looking at the will alone. The trust as set up by the will no longer existed in its original form. The

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[6] Their power to do so was implicitly upheld by the Texas court's decision.

property was no longer held subject to its terms. The statute refers to "the case of property held in trust." During the taxable years the property was held subject to the 1944 agreement, not subject to the will alone.

The "instrument creating" the trust with which we are concerned was primarily the trust agreement of 1944, plus those provisions of the will accepted by the settlement agreement. The "pertinent provisions" of the 1944 agreement can hardly be disputed; they provide for the allocation of depreciation and depletion to corpus. We need not go as far as the court in *Netcher* v. *Commissioner*, 143 F. 2d 484 (C. A. 7th), certiorari denied, 323 U. S. 759, or as both the majority and concurring judges in *Newbury* v. *United States*, 57 F. Supp. 168 (C. Cls.), certiorari denied, 323 U. S. 802, had to go to read into the instrument a direction to the trustee to maintain the corpus intact. In view of the explicit language of the trust agreement, as interpreted and enforced by the Texas court, there is no problem of construction of the trust instrument such as was present in those cases, and in *Fleming* v. *Commissioner*, 121 F. 2d 7 (C. A. 5th), and in *Fred A. Hubbard Apartments Trust* v. *Commissioner*, decided January 12, 1951 (1951 T.C. P-H Memorandum Decisions, par. 51,006).[7]

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[7] These latter two cases in fact are contrary to the petitioner's basic position, since they turn on the operation of the trusts during the taxable years in question rather than going back to the original intent of the settlor.

A problem of construction would be present if the payments to the taxpayer had been made under the original terms of the will, unmodified by the trust agreement of 1944. Even there, however, as pointed out by the court below (R. 42-43), there is a basis for finding that the intent of the testatrix was to set aside to corpus reserves for depletion and depreciation. So, even if we were to disregard the express terms of the trust in which the property was held and under which the taxpayer received her income, to look at the earlier, and obsolete, terms, they could be construed as requiring the same disposition of the allowances for depletion and depreciation.

CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

HOWARD A. HEFFRON,
Acting Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
DAVID O. WALTER,
Attorneys,
Department of Justice,
Washington 25, D. C.

MAY, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * *

(l) *Depreciation.*—* * * In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

(m) *Depletion.*—* * * In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(l)-1. *Depreciation.*—* * * In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard

to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee. * * *

* * * *

Sec. 29.23(m)-1. *Depletion of Mines, Oil and Gas Wells, Other Natural Deposits and Timber; Depreciation of Improvements.*—* * *

* * * *

* * * The principles governing the apportionment of depreciation in the case of property held by one person for life with remainder to another person and in the case of property held in trust are also applicable to depletion. (See section 29.23(l)-1.)

* * * *

Sections 39.23(l)-1 and 39,23(m)-1 of Treasury Regulations 118, applicable to years beginning after December 31, 1951, contain identical language.

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No. 16308

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

WILLIAM L. KUMLER,
WILSON B. COPES,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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PETITIONER'S REPLY BRIEF.

Argument.

The briefs of both parties acknowledge that there is no dispute as to the operative facts in the instant case. (Pet. Br. p. 5; Resp. Br. p. 15.) Their differences in position relate to the legal significance to be attached thereto for Federal income tax purposes.

Further, for lack of argument, it may be assumed that respondent has narrowed the legal issues by conceding the applicability of the following rules of law noted by petitioner in its brief.

(1) A grant of broad discretion to a trustee to allocate trust receipts to corpus or income, standing alone, does not constitute a direction in a trust instrument to apportion deductions for depreciation or depletion to the trustee.

From this it follows under the decision in *William Fleming, Trustee* (1941), 43 B. T. A. 229, affd. (C. C. A. 5, 1941), 121 F. 2d 7, that when, pursuant to such discretion, a trustee charges trust income, and credits reserves for amounts covering depreciation and depletion, the legal effect thereof is an allocation of trust income rather than an apportionment of deductions for purposes of applying subsections 23(l) and 23(m) of the Internal Revenue Code of 1939. (Pet. Br. Point I(a).)

(2) The term "trust income" as used in subsections 23(l) and 23(m) means net income, as defined by the Internal Revenue Code, before deductions for depreciation and depletion. (Pet. Br. Point I(c).)

(3) Congress establishes its own criteria in federal taxing matters and state law may control only when the federal taxing act by express language or necessary implications makes its operation dependent upon state law. (Pet. Br. Point III(b).)

Respondent's argument in support of the decision below is reduced to two propositions of law which are stated as follows:

(1) The Texas court's decision construing the provisions of the modified "Foster Will Trust" was a final adjudication of the rights of the parties thereunder and is controlling. (Br. p. 15.)

(2) The trust under which the apportionment of depreciation and depletion deductions was made and under which income was paid to and received by the taxpayer was the modified trust created by the trust agreement of 1944 and the will. (Br. p. 21.)

Respondent's stated propositions of law and the arguments advanced thereunder, as did the opinion of the Tax

Court, simply beg the basic question before this Court—whether, *for purposes of applying subsections 23(1) and 23(m) of the Internal Revenue Code,* the provisions of an instrument creating a testamentary trust, *i.e.,* a will, can be modified by an instrument of agreement among beneficiaries to which the deceased testatrix was not a party. Having assumed, without citation of any authority, that the federal taxing statute does permit reference to instruments extraneous to the will, respondent, as did the Tax Court, proceeds to the erroneous conclusion that Texas Court's adjudication of the rights of the parties, as to the *allocation* of trust income between life beneficiary and trustee, was equivalent, for federal tax purposes of an *apportionment* of the allowable deductions to the trustee.

Since the latter of the above two propositions stands or falls upon the validity or invalidity of the former, it is desirable to examine respondent's points of law in reverse order to that in which they appear in respondent's brief.

I.

Respondent Erroneously Contends That the Trust, Under Which Apportionment of the Deductions for Depreciation and Depletion Must Be Made for Federal Tax Purposes, Was the Modified Trust Created by the Trust Agreement of 1944 and the Will.

Both respondent (Resp. Br. 21) and the Tax Court [Tr. 40] are compelled to acknowledge that the will of Gloria D. Foster was the instrument which initially created the trust under consideration. It is then said to follow that the trust agreement of 1944 "modified" the Foster will trust and the instrument of modification thus

became an "integral portion of the instruments creating the trust." [Tr. 42.] (Resp. Br. 24.) This proposition of law has two aspects.

First: Could the trust agreement of 1944 modify the Foster will trust as a matter of local law?

Second: Even assuming the affirmative of the First proposition, can the trust agreement of 1944 be regarded as modifying the Foster will trust instrument for purposes of apportioning allowable deductions under the federal income tax statute?

Respondent's brief cites no authority in support of his position on either of the foregoing propositions. Indeed, he cannot because the authorities are contrary thereto.

(a) Effect of the Trust Agreement of 1944 Under Local Law.

Let us carefully consider what occurred. First, the will of Gloria D. Foster, deceased, contained provisions which created a testamentary trust. As the Tax Court found, "the will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust." [Tr. 30.] The will in two separate places provided that "the decision of the trustees as to what property is corpus and what property is income of my estate shall be final and binding upon all parties at interest hereunder." [Ex. 5-E, second and fifth pages.] The will also contained strict spendthrift provisions designed to preclude anticipation or disposition by any beneficiary of her interest in *either corpus or income.* [Ex. 5-E, par. 10.]

Gloria D. Foster's mother, Mary Jane Little, her mother-in-law, Mrs. Jeremiah Foster, and her sister-in-law, Evelyn Foster, were named the income beneficiaries; Ann Armstrong Knight and Marian Ralston Knight were

named the remaindermen to whom the corpus was to go after the death of Mary Jane Little.

After the will was admitted to probate in August, 1943, Mary Jane Little proposed to institute a will contest relying upon a prior will dated September 8, 1942. Such proceedings never went beyond the proposal stage as a compromise agreement was entered into by and between L. C. Webster and T. A. Knight, trustees under the will (First Parties), the two Knight girls (Second Parties), and Mary Jane Little (Third Party). This agreement dated September 20, 1944, is Exhibit 6-F herein, and will be referred to as the "Foster compromise agreement" to distinguish it from Exhibit 7-G herein, a trust agreement dated November 14, 1944. The two instruments, Exhibits 6-F and 7-G, are collectively referred to in the Tax Court's opinion and the briefs as the trust agreement of 1944.

Now, neither the Foster compromise agreement [Ex. 6-F] nor the trust agreement of November 14, 1944 [Ex. 7-G] by its terms even purports to change or modify the *provisions* of the Foster will trust for the simple reason that to have attempted to do so would have violated two controlling rules of local law.

The first rule which precluded modification of the Foster will trust with respect to the discretion conferred upon the trustees as to apportionment of trust receipts to corpus or income was the provision of section 26 of the Texas Trust Act, referred to at page 37 of petitioner's opening brief. That section made the grant of discretion to the trustees *by the will* controlling over the provisions of the Act.

The second rule which precluded modification of the *provisions* of the Foster will trust is the well established

rule of trust law to the effect that a trust cannot be terminated or its terms varied, by agreement of the beneficiaries of a testamentary trust and heirs contesting a will, where to do so would defeat in whole or in part the purpose of the testator in creating the trust. Scott in his work on trusts puts the rule this way:

> "If the will is contested, the court may approve a compromise under which in order to save the trust a part of the designated trust estate is surrendered.
>
> * * * * * * * *
>
> "Where the will provides for the creation of a spend-thrift trust, the beneficiaries cannot insist on receiving the property or a part of it free of trust, or insist on the creation of a trust under which their interests are alienable, *or otherwise vary the terms of the trust,* under the guise of a compromise agreement, merely because they wish to do so. The agreement must be submitted to the court for its approval, and the court will approve the agreement only if it is reasonably necessary for the protection of the interests of the beneficiaries." (Emphasis added.)

See III:

Scott on Trusts, 2d Ed. (1956), Sec. 337.6, p. 2465, *et seq.*

See also:

American Law Institute, *Restatement of the Law, Second, Trusts* 2d (1959), Sec. 337, (2) and Comments (1) and (o) thereunder.

The rule as expressed by the appellate court of Texas is, if anything, narrower than the rule in *Scott on Trusts*

and the *Restatement of the Law.* The Commission of Appeals of Texas has said:

> "* * * in short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees, nor the cestui que trust, nor his creditors or assignees can divert the property from the appointed purposes. Any conveyance whether by operation of law or by the act of any of the parties which disappoints the purposes of the settlor by diverting the property or the income from the purposes named would be a breach of the trust."
>
> *Hughes v. Jackson* (1935), 125 Tex. 130, 81 S. W. 2d 656.

Compare dictum in:

Sayers v. Baker (1943), 171 S. W. 2d 547.

The two cited rules of local law explain certain provisions in the trust agreement of 1944, and fortify the conclusion that in entering into the compromise the parties did not modify the provisions of the Foster will trust but rather agreed to act within its provisions in a specified manner.

The Foster compromise agreement [Ex. 6-F] provided that the trustees and the Knight girls were to attempt to secure a declaratory decree to the effect that the Knight girls' remainder interests were not subject to restrictions on alienation. If such a decree were obtained, the compromise agreement was to remain in force; if not, Third Party, Mary Jane Little, could at *her election* terminate it. [See Ex. 6-F, par. 2.] There is no record that any such decree was ever obtained. The trust agreement of

November 14, 1944, makes no such recital. Indeed, paragraph 11, of Section II of the trust agreement of November 14, 1944, recognizes that the conveyance by the Knight girls of their future interests in the corpus of the estate might not be effective to vest title thereto in the Mercantile National Bank at Dallas. [Ex. 7-G.]

Further, the Knight girls' legal disability to alienate their interests explains why the trustee under the trust agreement of November 14, 1944, was specifically declared therein to be holding "naked legal title" to such interests.

Lastly, neither of these instruments [Exs. 6-F or 7-G] purport to change the *provisions* of the Foster will trust insofar as they relate to the trustees' discretion in allocating trust receipts. It is expressly recognized in paragraph 4, page 3, of the trust agreement of November 14, 1944 [Ex. 7-G], that the will granted the trustee "broad discretion in determining what portion of receipts of the estate shall be *allocated* to corpus and what portion of such receipts shall be allocated to income of the estate." (Emphasis added.) The language which follows does not abrogate or modify the *provisions* of the Foster will trust at all. It is stated:

> "* * * and Third Party [the trustee bank] *in the exercise of such discretion* hereby undertakes to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by the will." (Emphasis added.)

The quoted language cannot in any sense to considered a modification *of the provisions of the will.* What it says in so many words is, simply, that in acting *pursuant* to the provisions of the will the Bank, as trustee, agrees to allocate trust receipts to income and corpus under the

formula prescribed by the law of Texas. It is noteworthy that the instrument itself employs words referring to the allocation of trust receipts. It does not refer to any apportionment of deductions.

It is, therefore, clear that *by its own terms* the trust agreement of 1944 contained provisions for an allocation of trust income within the purview of the federal taxing act, as distinguished from provisions apportioning deductions thereunder.

(b) Effect of the Trust Agreement of 1944 Under Federal Tax Law.

Even if it be assumed that the trust agreement of 1944 had the effect under local law of modifying the Foster will trust, respondent has failed to establish that such agreement had the legal effect of modifying the provisions of the "instrument creating the trust" within the meaning of subsections 23(1) and 23(m).

Neither respondent nor the Tax Court cite any authority in support of their position. Respondent contents himself with the unsupported statement that the *trust* with which the statute is concerned is the "modified trust" arising from the trust agreement of 1944. (Resp. Br. 23.) Sight is lost completely of the implications and connotations of the statutory words "instrument creating" the trust where a will is involved.

Respondent states that petitioner "assumes throughout" that the relevant trust is that "originally created by the will of Gloria Foster." (Resp. Br. 22.) Petitioner's position is based upon far more than mere assumption. As petitioner was at pains to point out in its opening brief (pp. 20-21, 31-33), the Congressional choice of words was advisedly made and with sound reason.

It is respondent who assumes that the federal tax statute permits him and the Tax Court to go outside the "instrument creating" the trust and read into it the provisions of instruments to which the testatrix was not a party.

It is respondent who assumes that the word "creating" is equivalent in meaning to the word "constituting."

It is respondent who assumes that an instrument which creates a secondary trust of the interests of beneficiaries under a testamentary trust becomes, in legal effect, part of the instrument which creates the testamentary trust. The word "create" has no such connotations.

Whatever may be said of inter-vivos trusts, where a settlor reserves or grants power to modify or revoke, or may legally do so with the consent of the beneficiaries, such is not the case where testamentary trusts are concerned. A testamentary trust is *created* only by the will of the testator and though its provisions can be construed, they cannot be modified.

> *Commissioner v. Netcher* (1944), 143 F. 2d 480 at 487.

By the time a will becomes effective and a testamentary trust comes into being, the *provisions* of the instrument creating it are beyond amendment, modification, or revocation.

> *Scott on Trusts, supra;*
> *Hughes v. Jackson, supra.*

Respondent says "petitioner has introduced unnecessary confusion in the case by its emphasis on a later trust not related to the year in controversy or to the tax issues here involved." (Resp. Br. 15.)

We beg to suggest that if confusion has been introduced, it is respondent who may be thanked for it, not petitioner. Respondent seems unable to decide which trust is the trust the provisions of which are at issue.

On page 15 of respondent's brief it is stated:

> "The agreements under which the 'Foster will trust' was modified also provided for a later trust, to become effective upon the death of the taxpayer. This later trust is irrelevant to the present case, since it did not become effective during the taxable years involved, nor did its terms relate to the issues here."

On page 16 it is stated:

> "The taxpayer threatened to contest the will, and a contract and agreement was entered into in September, 1944, followed by a trust agreement in November, 1944, which created the new trust referred to above, and also modified the Foster will trust."

Here, one pauses to inquire, if the trust agreement of November, 1944, was effective after the death of the taxpayer (which is true by its terms) and after the taxable years here involved, and was therefore, "irrelevant to the present case," how could it "modify" the provisions of the testamentary trust?

Then on page 33 of respondent's brief:

> "To put it differently, although petitioner argues as though there were but the original trust, analytically and chronologically there were three. The first was the trust provided in the will of Gloria Foster. The second was created in 1944, by agreement of all the persons claiming an interest in the corpus. This second, under which the income here taxed was paid

and received, contained terms substantially different from those in the will, and the document confirmed the validity of the will only as so modified. The third trust, also created in 1944, was to become operative only on the death of the taxpayer."

Now just which trust was the source of the income at issue in this case? On pages 15-16 respondent argues that the third trust modified the testamentary trust. On page 23 he speaks as if the testamentary trust had been terminated and the income here involved were received by the second trust set up *by agreement* of persons claiming an interest in the corpus, which second trust contained "terms substantially different" from those in the will. Respondent then recognizes on page 23, as before, that the third trust was operative only after Mary Jane Little's death.

Then respondent, throughly confused, says on page 23:

"Whether we consider the trust here in question as being a separate trust from the original one, or a modification of the original one, we cannot know what 'the trust' was during the taxable years by looking at the will alone. The trust as set up by the will no longer existed in its original form."

Petitioner does not exemplify respondent's confusion to embarrass respondent. Quite the contrary, the intention is to emphasize the *difficulties* involved in identifying the correct trust because the federal tax law states that the apportionment of deductions is controlled by the "pertinent provisions of the instrument creating the trust," from which the income is derived. It does not permit resort to other instruments whereby heirs or beneficiaries establish secondary trusts dealing with their expectancies, or whereby they settle their differences by agreeing so to do.

Some of the confusion is obviated by a careful examination of the provisions of the Foster compromise agreement of September 20, 1944. [Ex. 6-F.] This document did not, as respondent states, create or set up a second trust. It was an agreement whereby the parties agreed to create, in the future, a second trust of which the *res* was to consist of the remainder interests of the Knight girls when, as and if such interests vested in them after Mary Jane Little's death.

We further allude to respondent's confusion in order to point up the fact that his argument assumes that the Texas Court *construed* a modified testamentary trust, which, as a matter of law, it did not and could not have done in the face of the provisions of the will and section 26 of the Texas Trust Act. (See Pet. Op. Br. p. 37.)

Which brings us now to respondent's first point in argument.

II.

Notwithstanding the Texas Court's Decision Was a Final Adjudication With Respect to Certain Rights of the Beneficiaries of the Foster Will Trust, That Decision Was Not Controlling in the Matter of the Apportionment of Income Tax Deductions Under the Federal Taxing Statute.

Respondent's first point in argument (Br. 15) is that the decision of the Texas court construing the provisions of the modified Foster will trust was a final adjudication of the rights of the parties thereunder and is controlling. Controlling that decision may have been in some respects; but that it controls the issues in this case respondent wholly fails to demonstrate.

It is a cardinal principle of construction that a statute, a court decree or a legal document will be interpreted, if

possible, so as to give the same a meaning which does not violate an established rule of law as against a construction which does violate such a rule.

Respondent asks this Court to interpret the Texas court's decree as holding that the provisions of the Foster will were altered by extraneous documents and as so altered contained a direction that the trustee apportion all deduction for depletion and depreciation to the trustee. Respondent's argument urges this Court to interpret the Texas court's decision in a manner which would violate the express provisions of the will, section 26 of the Texas Trust Act, and the established rules of trust law recognized in the authorities cited in Point I, *ante,* herein.

Petitioner concedes that the Texas court's decree was a final adjudication. Petitioner concedes that that court's decree adjudicated *certain* rights of the parties involved in the proceeding before it. Petitioner concedes that the cases cited on page 20 of respondent's brief stand for the proposition that so far as a state court's decree determines the property rights of parties under local law, such a decree is determinative as to such rights where the federal taxing statute expressly or by necessary implication makes its operation dependent on state law.

Thus in *Freuler v. Helvering* (1934), 291 U. S. 35, a state court decree determining what income was distributable under state law was held to be controlling as to what income was distributable within the meaning of the federal taxing statute. This case did not however, involve the application of the specific provisions of sections 23(1) and 23(m) governing the allowance of deductions now before this Court. In the *Freuler* case, what constituted "distributable" income was expressly made to turn on state law including an order of a court governing

the distribution. Since the amount of the distribution in that case was influenced by the question whether under state law the trustee should have deducted depreciation, the decree of the state court on the issue necessarily fixed that amount.

The case was decided, however, before the addition to the federal tax statute of the rules for apportionment of deductions which are at issue in this Court. The provisions of the federal tax statute, here involved, superimpose a federal question upon the determination of the Texas court though the latter be final as between the parties before it.

This very type of situation was involved in *Blair v. Commissioner* (1937), 300 U. S. 5, cited by respondent. (Resp. Br. 20.) In the *Blair* case an Illinois court construed a will upon the issue whether under Illinois law a trust beneficiary's interest was alienable, and decreed that it was. The Supreme Court, in reviewing a tax controversy arising out of the state court decision, held that the latter's decree holding the interest to be assignable was final *as to that question.* But Justice Hughes then proceeded to consider the further question whether the assignment, though valid under Illinois law, was effective to shift the tax upon the income from the assignor to the assignees. "That," he said, "is a federal question." (Op. p. 11.)

The case of *Gallagher v. Smith* (1955), 223 F. 2d 218 (C. C. A. 3d), does nothing to alter or note any exception to the rules in *Freuler* and *Blair.*

Conceding, as petitioner does, the rules in the above cases, does not dispose of the federal question before this Court. Finality on the matter of state law here decided by the Texas court is but a premise to the federal question,

not, as respondent urges, dispositive of it. It is necessary to determine first, precisely what the Texas court did decide; second, what the effect of the decision was on the federal question.

(a) The Texas Court's Decision Did Not Amend or Alter the Provisions of the Will of Gloria D. Foster. Its Order Implemented Those Provisions.

Careful scrutiny of the Texas court's decree reveals that it did two basic things pertinent to our inquiry here.

(1) It adjudged that Messrs. Webster, Goodell and Knight, during their administration,

> "Out of the proceeds of oil, gas and other minerals produced and sold by the estate * * * correctly and properly computed depletion, and *allocated* correct and proper amounts to corpus for depletion, as shown by their final account on file herein.
>
> "II.
>
> "Plaintiffs also *allocated* correct and proper amounts to corpus for depreciation * * * ." (Emphasis added.)

(2) The Texas court ordered that:

> "In determining the 'net income' of decedent's estate, defendant, Mercantile National Bank at Dallas, as Successor Trustee of the Estate of Gloria D. Foster, Deceased, in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction, is authorized, required and directed to charge and set aside to corpus reserves for depreciation on oil and gas lease equipment and machinery, and depletion, in the following manner:

"(a) *Depreciation:* A reserve for depreciation on the oil and gas lease equipment and machinery belonging to said estate, commencing December 27, 1946, to be computed in the same manner and according to the same formula as the decedent did during her lifetime and as plaintiffs have done as shown by their final account, which reserve for depreciation shall be deducted from the proceeds of sales of runs of oil and gas produced by said estate subsequent to December 1, 1946, as set aside to corpus.

"(b) *Depletion:* Out of the proceeds of oil and gas runs produced and sold and to be produced and sold from each oil and gas lease subsequent to December 1, 1946, compute, charge and set aside to corpus 27½% of the gross proceeds of such sales of runs from each lease (but not to exceed 50% of the net income from such lease after deducting the expense and carrying charges of such lease, including depreciation, but not including depletion)."

Now, the Texas court's judgment and decree necessarily had to derive authority from one of three legal premises:

(1) A specific directive in the will. But this was impossible because, as the Tax Court found, "the will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust." [Tr. 30.]

(2) The provisions of section 33 of the Texas Trust Act. That statute, however, expressly provided that if the settlor of a trust grants discretion to the trustee to apportion trust receipts to corpus or income, such provision controls notwithstanding the provisions of section 33 of the Act.

(3) The proposition of law that by its undertaking in the trust agreement of November 14, 1944, the trustee was estopped to exercise the discretion granted it by the will in any manner other than in accordance with Texas Trust Act. This proposition of law is the only one which does not do violence to the provisions of the will, section 26 of the Texas Trust Act, and the authorities cited under Point I *ante*.

The Texas Court's decision contains not a single word which supports the theory that trust agreement of 1944 had the legal effect of altering or modifying the *provisions* of the will. But the decree does recognize that Messrs. Webster, Goodell and Knight could properly *allocate* portions of trust income between corpus and income beneficiaries representing depletion and depreciation on the one hand and *net* income of the other. Why? Because the will granted them discretion so to do. Further, the decree could and did direct the trustee bank to *allocate* trust income in such manner because the will granted the trustee such discretion and the trustee had agreed to exercise its discretion in said manner.

Thus if the Texas court's decree is given the only interpretation which does not violate recognized rules of local law, the conclusion is inescapable that its legal effect was to authorize and direct the trustee to *allocate* trust income between income beneficiaries and trustee in accordance with the trustee's undertaking so to do. This being its legal effect, how, then, is the federal question resolved?

(b) The Effect of the Texas Court's Decree Upon the Federal Question Is That the Deductions for Depreciation and Depletion Must Be Apportioned Between Income Beneficiaries and Trustee on the Basis of the Trust Income Allocable to Each.

Under the federal tax statute the apportionment of the deductions between income beneficiaries and trustee is made to turn *first* upon whether the testatrix provided for such an apportionment in her will. If not the apportionment *must* be made upon the basis that trust income (before depletion and depreciation) has been allocated by the trustee to each.

It has been demonstrated in Point I, *ante,* supported by controlling authority, that the will contained no provisions for the apportionment of such deductions either expressly, or by way of modification or alteration by extraneous instruments.

It has been demonstrated, also, that under the only legally acceptable interpretation of the Texas court's decree, what the trustee did during the taxable year before us was to *allocate* trust income between income beneficiaries and itself. This being so, the federal question is thereby resolved, since the federal tax statute requires the deductions to be apportioned in the manner which the taxpayer apportioned them in her return. (Pet. Op. Br. Point I, pp. 20-26.)

Conclusion.

The decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,

WILLIAM L. KUMLER,

WILSON B. COPES,

Attorneys for Petitioner.

No. 16308

United States

Court of Appeals

for the Ninth Circuit

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif. —3-6-59

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

WILLIAM L. KUMLER,
WILSON B. COPES,
1104 Pacific Mutual Building,
Los Angeles 14, California,

Attorneys for Petitioner.

CHARLES K. RICE,
Assistant U. S. Attorney General,
LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.,

Attorneys for Respondent.

Tax Court of the United States

Docket No. 58688

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1955

July 1—Petition received and filed. Taxpayer notified. Fee paid.

July 5—Copy of petition served on General Counsel.

Aug. 15—Answer filed by General Counsel.

Aug. 15—Request for hearing in Los Angeles, Calif., filed by General Counsel.

Aug. 17—Notice issued placing proceeding on Los Angeles, Calif., calendar. Service of Answer and Request made.

Oct. 4—Leave granted to file reply. Reply to answer filed by petitioner. 10/5/55—copy served.

1957

Apr. 2—Hearing set June 3, 1957—Los Angeles, Calif.

1957

May 3—Notice of appearance of William L. Kumler and Wilson B. Copes as counsel filed.

May 7—Notice of change of beginning date to June 4, 1957, Los Angeles, Calif.

June 6—Hearing had before Judge Mulroney on the merits. Written motion of counsel for respondent to file amendment to answer filed at hearing and granted. Oral motion of counsel for petitioner to file reply—Stipulation of facts filed. Petitioner's brief due 9/4/57; Respondent's brief due 12/3/57; Petitioner's reply brief due 1/17/58.

June 27—Transcript of Hearing 6/6/57 filed.

Aug. 26—Motion by petitioner for extension of time to Oct. 4, 1957 to file brief. Granted 8/26/57. Served 8/26/57.

Sept. 30—Motion by petitioner for extension of time to Nov. 6, 1957 to file brief. Granted 9/30/57. Served 10/2/57.

Nov. 5—Brief for Petitioner filed. Served 11/7/57.

1958

Feb. 3—Motion by respondent for extension of time to Mar. 10, 1958 to file brief in answer. Granted 2/4/58. Served 2/7/58.

Mar. 10—Motion by respondent for extension of time to Mar. 31, 1958 to file brief in answer. Granted 3/11/58.

Mar. 31—Reply Brief filed. Served 4/2/58.

May 1—Motion by petitioner for extension of time to June 2, 1958 to file reply brief. Granted 5/1/58.

1958

June 2—Reply brief for petitioner filed. Served 6/4/58.

July 21—Opinion filed. Judge Mulroney. Decision will be entered for the Respondent. Served 7/21/58.

July 21—Decision entered. Judge Mulroney.

Sept. 30—Petition for Review by U.S.C.A. 9th Cir. filed by petitioner.

Oct. 3—Proof of service of petition for review filed.

Oct. 29—Designation of Contents of Record on Review with proof of service thereon filed by petitioner.

Oct. 31—Order extending time for filing record on review and docketing petition for review to December 29, 1958. Served 11/4/58.

[Title of Tax Court and Cause.]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (Ap:LA:AA:KD-HT 90D:HNR) dated April 7, 1955, and as a basis of its proceeding alleges as follows:

1. The petitioner, Bank of America National Trust and Savings Association, a national banking institution organized under the laws of the United

States, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased. The address of the petitioner is 660 South Spring Street, Los Angeles 14, California. The income tax returns of Mary Jane Little, then living, for the periods here involved were filed with the collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on or about April 7, 1955.

3. The deficiencies as determined by the Commissioner are in income taxes of Mary Jane Little, now deceased, as follows:

1949	$22,899.07
1950	23,909.64
1951	29,912.41
1952	30,731.00

All of said deficiencies are in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in including in the gross income of Mary Jane Little for the calendar year 1949 fiduciary income in the sum of $540.00.

b. The Commissioner erred in failing to allow as deductions under sections 23(l) and 23(m) of the Internal Revenue Code of 1939 depreciation and depletion in aggregate amounts as follows:

1949	$31,071.20
1950	31,278.70
1951	35,534.02
1952	35,113.37

c. The Commissioner erred in determining that any possible deficiency in income taxes for the calendar year 1949 is assessable under the provisions of section 3801 of the Internal Revenue Code of 1939.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

a. Gloria D. Foster, daughter of Mary Jane Little (hereinafter called "decedent"), died on or about July 30, 1943, a resident of Dallas, Texas.

b. The last will and testament of said Gloria D. Foster was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943.

c. A large part of the estate of said Gloria D. Foster consisted of undivided interests in oil and gas producing properties and equipment.

d. The last will and testament of said Gloria D. Foster, after making certain specific bequests of cash and personal effects, devised the residue of her estate in trust, directing the trustees to pay out of the net income of her estate $200.00 per month to Eva Culbertson for life, $100.00 per month to Mrs. Jeremiah Foster for life (thereafter to Evelyn Foster for life) and the remaining amount to the decedent for life.

e. The testamentary trust so created was to terminate upon the death of the decedent and the corpus to be distributed to certain named individuals.

f. The trustees named in said last will and testament refused to serve as trustees and under a power granted to them under the terms of said last will and testament appointed Mercantile National Bank at Dallas, a national banking corporation, to act as trustee. Said Mercantile National Bank at Dallas accepted said appointment.

g. The last will and testament of said Gloria D. Foster contains no provision for the apportionment of the allowable deductions for depreciation and depletion as contemplated by sections 23(l) and 23(m) of the Internal Revenue Code of 1939.

h. During the years 1949, 1950, 1951 and 1952, among others, Mary Jane Little, decedent herein, was entitled to receive all the distributable income of the trust, except for $3600 per year which was divided between two other lifetime beneficiaries.

i. The decedent reported such distributable income on her individual income tax returns for the appropriate years and deducted therefrom in computing her individual net taxable income that portion of the depletion and depreciation which bore the same ratio to the total depletion and depreciation attributable to the trust income as the income of the trust distributed or distributable to her bore to the total income of the trust.

j. The income tax return of the decedent for the calendar year 1949 was filed on or before March 15, 1950.

k. Neither the decedent (to the best information

and belief of petitioner) nor the petitioner has ever executed a Consent Fixing the Period of Limitation Upon Assessment of Income and Profits Taxes or in any other manner extended the period of limitation on assessment provided for in section 275(a) of the Internal Revenue Code for the calendar year 1949.

l. The decedent died on or about September 10, 1953.

m. The petitioner, Bank of America National Trust and Savings Association, a national banking institution, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine (1) that Mary Jane Little, decedent, was entitled to deductions for depreciation and depletion for the years set forth in Paragraph 4(b) and in the amount set forth in said Paragraph 4(b), or in such other amounts as may be proper; and (2) that there are no income tax deficiencies due from petitioner for the calendar years 1949, or 1950, or 1951, or 1952.

/s/ HAROLD C. MORTON,
/s/ JAMES M. McROBERTS,
Attorneys for Petitioner.

Duly Verified.

EXHIBIT "A"

(Copy)

1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California

Ap: LA:AA:KD-HT
90D:HNR

April 7, 1955

Estate of Mary Jane Little, Deceased
Bank of America National Trust and Savings Association, Executor
660 South Spring Street, Los Angeles 14, Calif.

Gentlemen:

You are advised that the determination of the income tax liability of Mary Jane Little, deceased, for the taxable years ended December 31, 1949, December 31, 1950, December 31, 1951, and December 31, 1952, discloses deficiencies aggregating $107,452.12, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal

holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute, in duplicate, the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner of Internal Revenue,
/s/ By H. L. DUCKER,
Associate Chief, Appellate Division

Enclosures: Statement, Form 1276, Agreement Form

TThaxton:vmc

Statement

Ap:LA:AA:KD-HT (Copy)
90D-HNR

Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, 660 South Spring Street, Los Angeles 14, California.

Tax Liability for the Taxable Years Ended December 31, 1949, December 31, 1950, December 31, 1951, December 31, 1952

INCOME TAX

	Deficiency
1949	$ 22,899.07
1950	23,909.64
1951	29,912.41
1952	30,731.00
	$107,452.12

The determination of the income tax liability of Mary Jane Little, deceased, has been made upon the basis of information on file in this office.

In reporting taxable income received as beneficiary of the Gloria D. Foster Trust, the taxpayer claimed deductions for depreciation and depletion in the following amounts:

1949	$31,071.20
1950	31,278.70
1951	35,534.02
1952	35,113.37

It is determined that all allowances for depreciation and depletion on the properties of the Gloria D. Foster Trust are deductible only by the trustee. The above deductions are accordingly disallowed.

It is determined that the deficiency with respect to the taxable year 1949 is assessable under the provisions of section 3801 Internal Revenue Code as applicable to that year.

A copy of this letter and statement has been mailed to your representative, Mr. James M. McRoberts, 523 West Sixth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1949

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$ 69,434.93
Additional income:		
(a) Fiduciary income	$ 540.00	
(b) Depreciation and depletion	31,071.20	31,611.20
Net income as corrected		$101,046.13

EXPLANATION OF ADJUSTMENTS

(a) This adjustment was made to net income in the report of examination dated May 16, 1951, and has been agreed to by you.

(b) This adjustment has been previously explained herein.

COMPUTATION OF TAX

Net income as corrected		$101,046.13
Less: Exemptions (2)		1,200.00
Amount subject to tax		$ 99,846.13
Tentative tax		$ 67,186.13
Less: Percentage reduction		
$ 400.00 at 17%	$ 68.00	
66,786.13 at 12%	8,014.34	8,082.34
Correct income tax liability		$ 59,103.79
Assessed:		
Tax shown on original return, Acct. No. 9128014	$ 35,834.06	
Additional July 26, 1951	35,834.06	$ 59,103.79
List, Acct. 7-510426	370.66	36,204.72
Deficiency of income tax		$ 22,899.07

Taxable Year Ended December 31, 1950

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$ 70,620.76
Additional income:	
(a) Depreciation and depletion	31,278.70
Net income as corrected	$101,899.46

EXPLANATION OF ADJUSTMENTS

(a) This adjustment as been previously explained herein.

COMPUTATION OF TAX

Net income as corrected		$101,899.46
Less: Exemptions (2)		1,200.00
Amount subject to tax		$100,699.46
Tentative tax		$ 67,942.52
Less: Percentage reduction		
$ 400.00 at 13%	$ 52.00	
67,542.52 at 9%	6,078.83	6,130.83
Correct income tax liability		$ 61,811.69

Income tax liability disclosed by return, Acct. No. 3039224	37,902.05
Deficiency of income tax	$ 23,909.64

Taxable Year Ended December 31, 1951

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$ 68,955.66
Additional income:	
(a) Depreciation and depletion	35,534.02
Net income as corrected	$104,489.68

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.

COMPUTATION OF TAX

Net income as corrected	$104,489.68
Less: Exemptions (3)	1,800.00
Amount subject to tax	$102,689.68
Tax on $102,689.68	$ 70,189.82
Correct income tax liability	$ 70,189.82
Income tax liability disclosed by return, Acct. No. 270004013	40,277.41
Deficiency of income tax	$ 29,912.41

Taxable Year Ended December 31, 1952

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$ 79,356.63
Additional income:	
(a) Depreciation and depletion	35,113.37
Net income as corrected	$114,470.00

EXPLANATION OF ADJUSTMENTS

(a) This adjustment has been previously explained herein.

COMPUTATION OF TAX—1952

Net income as corrected	$114,470.00
Less: Exemptions (3)	1,800.00
Amount subject to tax	$112,670.00
Tax on $112,670.00	$ 81,619.00
Correct income tax liability	$ 81,619.00
Income tax liability disclosed by return, Acct. No. 243002071	$ 50,888.00
Deficiency of income tax	$ 30,731.00

[Endorsed]: T.C.U.S. Filed July 1, 1955.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. a-c. Denies that respondent's determination is based upon errors as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. a-b. Admits the allegations of fact contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

c-h, inc. Admits the Mercantile National Bank at Dallas, Texas, accepted appointment as Trustee of the Gloria D. Foster Trust. Denies the remaining

allegations contained in subparagraphs (c) to (h), inclusive, of paragraph 5 of the petition.

i. Admits that in reporting the income that Mary Jane Little received for the years 1949, 1950, 1951 and 1952 as beneficiary of the Gloria D. Foster Trust, that she claimed certain deductions for depreciation and depletion in her returns, but respondent specifically denies that she was entitled to the deductions claimed, and further denies all remaining allegations contained in subparagraph (i) of paragraph 5 of the petition.

j. Admits the allegations contained in subparagraph (j) of paragraph 5 of the petition.

k. Denies the allegations contained in subparagraph (k) of paragraph 5 of the petition. Alleges that on October 26, 1953 the Tax Court entered its decision in the case of Mercantile National Bank of Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, in a stipulated case, which decision had the effect of allowing the trust the entire deduction for depreciation and depletion for the year 1949. Alleges the decision became final after the lapse of the 90-day appeal period, or on January 25, 1954. Alleges the deductions claimed by the beneficiary (Mary Jane Little) here in Docket No. 58688 are duplications of part of the deductions allowed to the trust. Alleges that Section 3801 of the 1939 Internal Revenue Code, provides in substance that within a period of one year after the Tax Court's decision on a fiduciary case becomes final, a duplication of deduction in the case of a beneficiary may be

disallowed and assessed without regard to the expiration of other statutes of limitations. Alleges that in the case of this petitioner (the beneficiary of the trust), a consent was executed on December 21, 1954, extending to June 30, 1955, the statute of limitations with respect to the year 1949 (to the extent that the statutes or defenses had not accrued to the taxpayer as of that date). Alleges that under these circumstances that the deficiency proposed against the petitioner in the deficiency notice of April 7, 1955 with respect to the year 1949 is assessable under the provisions of Section 3801 as extended by the consent executed on December 21, 1954.

l-m. Admits the allegations contained in subparagraphs (l) and (m) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition, not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that this appeal be denied and that the respondent's determination be sustained.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel; E. C. Crouter, Assistant Regional Counsel; R. E. Maiden, Jr., Special Assistant to the Regional

Counsel; Donald P. Chehock, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed August 15, 1955.

[Title of Tax Court and Cause.]

REPLY

The Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, by its attorneys, Harold C. Morton and James M. McRoberts, for reply to the answer of the above named Respondent, admits, denies and alleges as follows:

5. k. Admits that the Tax Court entered its decision in the case of Mercantile National Bank of Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, but Petitioner does allege that neither it nor the decedent, Mary Jane Little, were parties to said proceedings. Further answering subparagraph k. of paragraph 5., Petitioner does deny generally and specifically each and every other allegation of said subparagraph k. of paragraph 5. as set forth and contained therein.

Respectfully submitted,

/s/ HAROLD C. MORTON,
/s/ JAMES M. McROBERTS,
Attorneys for Petitioner.

Served October 5, 1955.

[Endorsed]: T.C.U.S. Filed October 4, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce upon the trial of this case any other and further evidence not inconsistent with the facts herein stipulated.

1. The petitioner, Bank of America National Trust and Savings Association, is the duly appointed and acting Executor of the Estate of Mary Jane Little, deceased. The address of the petitioner is 660 South Spring Street, Los Angeles 14, California.

2. Mary Jane Little died on or about September 10, 1953, a resident of Los Angeles County, State of California.

3. For all years here involved Mary Jane Little filed her Federal income tax returns with the Collector of Internal Revenue for the Sixth District of California at Los Angeles (or the District Director of Internal Revenue, Los Angeles, California). Attached hereto and marked Exhibit 1-A is a copy of Mary Jane Little's 1949 Federal income tax return as filed, to which is appended a consent signed December 21, 1954, extending the statute of limitations to June 30, 1955. Attached hereto and marked Exhibits 2-B, 3-C and 4-D are copies of Mary Jane Little's 1950, 1951 and 1952 Federal income tax returns as filed.

4. Gloria D. Foster (daughter of Mary Jane Little) died on or about July 30, 1943, a resident of Dallas County, State of Texas.

5. For many years prior to her death, Gloria D. Foster conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death on July 30, 1943, Gloria D. Foster owned undivided interests in approximately eighty-four (84) producing oil wells in this field and in the physical equipment used in connection therewith. The oil income distributed to Mary Jane Little as beneficiary of the Gloria D. Foster Trust during the years here involved (from which the depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties.

6. The Last Will and Testament of said Gloria D. Foster, deceased, was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. A copy of said Will, marked Exhibit 5-E, is attached hereto and made a part hereof.

7. The trustees named in said Will accepted the trust established therein and allocated to the corpus of said trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion as was equal to the amount of depreciation and depletion allowable for Federal income tax purposes with respect to such income.

8. For the purpose of settling a proposed contest of the aforementioned Gloria D. Foster Will by

Mary Jane Little, a Contract and Agreement was entered into on September 20, 1944, by and between the parties mentioned therein. A copy of such Contract and Agreement, marked Exhibit 6-F, is attached hereto and made a part hereof.

9. The Trust Agreement referred to in the aforesaid Contract and Agreement was thereafter executed under date of November 14, 1944, by all parties involved. (The Trust Agreement is designated as Exhibit D in Section 1, paragraph 3 of the Contract and Agreement, Exhibit 6-F.) Pursuant to the terms of said Contract and Agreement, L. C. Webster, Sol Goodell and T. A. Knight resigned as trustees and were succeeded by the Mercantile National Bank of Dallas as successor trustee. Attached hereto, marked Exhibit 7-G, is a copy of the said Trust Agreement of November 14, 1944.

10. Following the appointment of the Mercantile National Bank of Dallas as successor trustee, suit was filed on September 30, 1947, in the District Court of Dallas County, Texas, 68th Judicial District, by L. C. Webster, T. A. Knight and Sol Goodell against the Mercantile National Bank at Dallas (successor trustee), Mary Jane Little, Talbot Shelton and Wharton E. Weems (the latter two as assignees of a remainder interest in the trust properties acquired by Mary Jane Little under the settlement agreement of September 20, 1944), Ann Knight Bower and husband, J. R. Bower, Jr., Marian Knight Rowe and Fredrick E. Rowe, Jr. Attached hereto, marked Exhibit 8-H, is a copy of the pleadings and judgment in the suit above re-

ferred to, started September 30, 1947, between L. C. Webster et al vs. Mercantile National Bank at Dallas, Trustee, et al, No. 15622-C, 68th Judicial District of Dallas County, Texas. The original petition, filed September 30, 1947, is marked Exhibit 8-H(1); the answer to petition and cross-action of the defendants Ann Knight Bower et ux and Marian Knight Rowe et ux, filed October 6, 1947, is marked Exhibit 8-H(2); the original answer of defendant Wharton E. Weems to the petition, filed October 24, 1947, is marked Exhibit 8-H(3); the original answer of defendant Weems to the cross-action of Ann Knight Bower et al, filed October 24, 1947, is marked Exhibit 8-H(4); the answer of Mercantile National Bank at Dallas to the petition, filed October 27, 1947, is marked Exhibit 8-H(5); the answer of defendant Mary Jane Little to plaintiff's petition, filed November 10, 1947, is marked Exhibit 8-H(6); the original answer of defendant Mary Jane Little to cross-action of Ann Knight Bower et al, filed November 10, 1947, is marked Exhibit 8-H(7); the answer of defendant Shelton to petition, filed November 17, 1947, is marked Exhibit 8-H(8); the answer of defendant Shelton to cross-action of Ann Knight Bower et al, filed November 17, 1947, is marked Exhibit 8-H(9); the first amended original petition of plaintiffs, filed April 5, 1948, is marked Exhibit 8-H(10); the first amended answer of Mercantile National Bank at Dallas to plaintiffs' amended petition, filed April 5, 1948, is marked Exhibit 8-H(11); the answer of Ann Knight Bower et ux and Marian Knight Rowe et ux, to plaintiffs'

amended petition and cross-action filed April 5, 1948, is marked Exhibit 8-H(12); the answer of defendant Mary Jane Little to plaintiffs' amended petition, filed April 5, 1948, is marked Exhibit 8-H(13); the first amended original answer of defendant Mary Jane Little to cross-action of Ann Knight Bower et al, filed April 6, 1948, is marked Exhibit 8-H(14); the judgment of the Court of December 13, 1948, is marked Exhibit 8-H(15). The petitioner and respondent in this Docket No. 58688, of course, do not stipulate as facts any of the allegations contained in the court pleading documents, Exhibit 8-H. The court documents referred to above as Exhibit 8-H constitute the entire record of this proceeding in the Texas court.

11. Mary Jane Little in open court excepted to the judgment of December 13, 1948, and gave oral notice of appeal, but said appeal was not perfected by her, and said judgment became final.

12. Sproles & Woodard, Certified Public Accountants, of Fort Worth, Texas, were the accountants who kept the books and records of Gloria D. Foster, while living, and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here involved. Deductions for depletion and depreciation have been claimed in the Federal income tax returns, throughout, consistent with the books of Gloria D. Foster, and the books of her estate and trust. The books of Gloria

D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August 1943 to December 1946, and thereafter the trust has used "percentage" depletion. Attached hereto, marked Exhibit 9-I(1) through (6), respectively, are the financial statements submitted to the Gloria D. Foster Trust by Sproles & Woodard for the years 1946, 1947, 1948, 1949, 1950 and 1951. Attached hereto, marked Exhibits 10-J, 11-K, 12-L and 13-M, are copies of the Gloria D. Foster Trust Federal income tax returns as filed for the years 1949, 1950, 1951 and 1952, respectively.

13. On June 20, 1952 the Commissioner of Internal Revenue determined a deficiency in income tax of the Gloria D. Foster Trust for the year 1949 based on a disallowance of a portion of the depreciation and depletion claimed. After pleadings on the issue had been filed in the Tax Court a stipulation of no deficiency was filed and decision entered in accordance therewith on October 26, 1953 (which decision became final three months thereafter upon

expiration of the appeal period). The records of Mercantile National Bank at Dallas, Trustee of Gloria D. Foster Trust, Docket No. 44163, consisting of the petition, answer, stipulation and decision, marked respectively as Exhibit 14-N(1) through (4), are attached hereto and made a part hereof. The petitioner and respondent in this Docket No. 58688, of course, do not stipulate as facts any of the allegations contained in the court pleading documents, Exhibit 14-N.

/s/ WILLIAM L. KUMLER,
Counsel for Petitioner,
/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed June 6, 1957.

[Title of Tax Court and Cause.]

AMENDMENT TO ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, Nelson P. Rose, Chief Counsel, Internal Revenue Service, and for amendment to the answer to the petition filed in this case, alleges as follows:

Inserts at the end of paragraph 6 of the answer now on file (and prior to the Wherefore clause), the following:

7. Respondent further affirmatively alleges as follows:

a. The Executors of the Estate of Gloria D. Foster, deceased, the Trustee of the Gloria D. Foster Trust, and Mary Jane Little as life beneficiary under the estate and trust were party litigants in a contested suit in a state court of Texas in 1947 and 1948 involving the question of whether the Gloria D. Foster Estate and Trust was required to set aside to the trust corpus the allowable amounts for depletion and depreciation in the determination of the "net income" distributable under the trust to the life beneficiary, Mary Jane Little. The final judgment was rendered in this case on December 13, 1948 approving the actions of the estate and trust in retaining in the corpus the amounts for depletion and depreciation. Said judgment further ordered and directed the Trustee to set aside thereafter to the trust corpus the allowable amounts for depletion and depreciation, which court order necessarily constitutes an adjudication and directive with respect to the years 1949, 1950, 1951 and 1952 here involved in the instant tax case.

b. Respondent alleges that by virtue of such adjudication in the Texas court, the matter here at issue in this Docket No. 58688 has already been adjudicated, and the petitioner is now estopped from claiming tax deductions inconsistent with the property rights (and tax benefits flowing therefrom) of

the parties fully litigated and finally determined by said state court judgment.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel; E. C. Crouter, Assistant Regional Counsel; R. E. Maiden, Jr., Special Assistant to the Regional Counsel; Donald P. Chehock, Attorney, Internal Revenue Service.

Served June 6, 1957.

[Endorsed]: T.C.U.S. Filed June 6, 1957.

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30 T. C. No. 98

Tax Court of the United States

Estate of Mary Jane Little, Deceased; Bank of America National Trust and Savings Association, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 58688 Filed July 21, 1958

FINDINGS OF FACT AND OPINION

Held, that a testamentary trust, as modified by a later trust agreement, constitutes the "instrument creating the trust" within the provisions of subsections 23 (l) and 23 (m) of the Internal Revenue Code of 1939 and that under such instrument no portion of allowable deductions for depreciation and

depletion is allocable to petitioner, an income beneficiary of the trust.

William L. Kumler, Esq., for the petitioner.
Donald P. Chehock, Esq., for the respondent.

Opinion

Mulroney, Judge: Respondent determined deficiencies in the petitioner's income tax as follows:

Year	Deficiency
1949	$22,899.07
1950	23,909.64
1951	29,912.41
1952	30,731.00

The issue is whether the decedent, a life beneficiary under a trust, is entitled to a portion of the deductions for depletion and depreciation on the trust oil properties or whether the trust is entitled to the entire deduction for such items.

All the facts have been stipulated and are found accordingly.

Mary Jane Little died on or about September 10, 1953, a resident of Los Angeles County, California. Decedent filed her Federal income tax returns for the years 1949, 1950 and 1951 with the then collector of internal revenue and for the year 1952 with the district director of internal revenue for the sixth district of California, Los Angeles, California. The Bank of America National Trust and Savings Association is the duly appointed and acting executor of the Estate of Mary Jane Little, deceased.

Decedent was the mother of Gloria D. Foster, who died on or about July 30, 1943, a resident of Dallas County, Texas. For many years prior to her death, Gloria conducted an oil business, owning, operating, developing and maintaining many producing oil and gas leases in the East Texas oil field. At the date of her death in 1943 she owned undivided interests in approximately 84 producing oil wells in this field and in the physical equipment used in connection therewith. The oil income distributed to Mary Jane Little as beneficiary of the Gloria D. Foster Trust during the years here involved (from which depletion and depreciation deductions here at issue were taken) was derived from these oil properties, or other subsequently acquired similar oil properties.

The last will and testament of Gloria D. Foster, deceased, was duly probated by order of the County Court of Dallas County, Texas, on August 16, 1943. The will named L. C. Webster, Sol Goodell and T. A. Knight executors. After providing for a few specific bequests of cash and personal effects, the residue of Gloria's property was devised and bequeathed to L. C. Webster, T. A. Knight and Sol Goodell as trustees. The trust provisions of the will are contained in Article "V" and in this portion of the will said trustees were given broad authority and discretion in connection with the management of the corpus, investments and reinvestments. Paragraph 2 of Article V of the will provided, in part, that the "decision of trustees as to what property is corpus and what property is income of [the] estate, shall be final and binding on

all parties at interest hereunder. * * *'' The will made no mention of the treatment of depletion and depreciation deduction as between income beneficiaries and the trust. Paragraphs 8 and 9 of Article V of the will provided as follows:

8. Out of the net income of my estate I direct that Two Hundred ($200.00) Dollars per month shall be paid to my faithful servant, Eva Culbertson, during her lifetime, and One Hundred ($100.00) Dollars per month shall be paid to my mother-in-law, Mrs. Jeremiah Foster, during her lifetime and thereafter to my sister-in-law, Evelyn Foster, during her lifetime. All other net income from my estate shall be paid to my mother, Mary Jane Little, during her lifetime. If during any calendar year after the calendar year during which I die, while my mother is alive, the net income so paid my mother is less than Twelve Thousand ($12-000.00) Dollars, I direct that at the end thereof trustees pay to her the difference out of the corpus of my estate if she so requests.

9. This trust shall terminate on the date of the death of my mother, Mary Jane Little. On termination of this trust, I direct that all the estate and properties constituting it that are then in the hands of trustees shall pass and vest in fees simple and by trustees shall be conveyed.

(a) one-half to Ann Armstrong Knight, if she then be living, and to her heirs per stirpes if she then be dead; and

(b) one-half to Marian Ralston Knight, if she

then be living, and to her heirs per stirpes if she then be dead.

The trustees named in the will accepted the trust and allocated to the corpus of the trust so much of the income of the trust after operating expenses but prior to any deductions for depreciation and depletion as was equal to the amount of depreciation and depletion allowable for Federal income tax purposes with respect to such income.

Decedent, Mary Jane Little, proposed to institute proceedings to contest Gloria's will dated April 19, 1943, relying upon the validity of a prior will dated September 8, 1942. For the purpose of settling the threatened will contest a contract and agreement, dated September 20, 1944, was entered into by and between the interested parties. The contract and agreement provided, in part, as follows: (a) that the purpose of the "contract and agreement is to settle, adjust and compromise all matters in issue or controversy between any and all of the parties hereto;" (b) that the trustees named under Gloria's will (dated April 19, 1943) were to resign as trustees, and others were to be appointed; (c) a trust agreement was to be entered into by all beneficiaries under the will, with changes in the power and duties of the new trustees, and with changes in the rights of the beneficiaries.

The trust agreement was executed by all the beneficiaries under date of November 14, 1944 and the old trustees resigned and were succeeded by the Mercantile National Bank at Dallas. Instead of the broad powers of disposition under the trust created

by the will, the new trustee (with specified exceptions) could not encumber or dispose of properties constituting corpus of the trust without the consent of the beneficiaries. In place of the former broad powers of reinvestment, the trustee under the new trust agreement was limited to investments in United States Government bonds, unless consent to invest otherwise was given by the beneficiaries. As contrasted with the broad discretion to determine "what portion of receipts of the estate shall be allocated to corpus of the estate, and what portion of such receipts shall be allocated to income of the estate" granted to the trustees under the will, the new trustee under the trust agreement was "to make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will." After the death of Mary Jane Little, and providing that neither she nor her assignees, heirs, representatives or any person claiming through her attacked the Gloria D. Foster will, then under the new trust agreement one-half of the then corpus of the trust was to be distributed to Ann Armstrong Knight and Marian Knight Rowe in equal shares, or to their heirs per stirpes, and the other half of the then corpus of the trust was to be distributed to the heirs, representatives, legatees or assigns of Mary Jane Little.

On September 30, 1947, a suit was brought in the district court of Dallas County, Texas, by L. C. Webster, Sol Goodell and T. A. Knight, as independent executors of the Estate of Gloria D. Foster,

deceased, against Mercantile National Bank at Dallas, as successor trustee of the Estate of Gloria D. Foster, deceased; Mary Jane Little, deceased; Talbot Shelton and Wharton E. Weems, as owners of one-half of the remainder interest in the estate; J. R. Bower, Jr., Ann Knight Bower, Frederick E. Rowe, Jr., and Marian Knight Rowe, as owners of the other half of the remainder interest in the estate. In their petition plaintiffs alleged that during the course of their administration they, as executors, had received proceeds from the sale of oil and gas from properties of the estate up to December 1, 1946, at which date the Mercantile National Bank at Dallas commenced collecting such proceeds; that they, as executors, had allocated to the corpus of the estate amounts representing "cost" depletion on oil produced and sold, together with depreciation on facilities, equipment, furniture, fixtures and the like, in accordance with practices employed by decedent, Gloria D. Foster, during her lifetime; that they, as executors, set forth such allocations of proceeds to corpus in their final account filed with the court, and they prayed that the court construe the will, particularly with reference to the meaning of the term "net income" as used therein, so as to approve their final account and to instruct them respecting the matter of what portion of funds in their hands represented net income and what portion was corpus and to discharge them from further liability and responsibility as executors.

In their answer the defendants, Ann Knight

Bower, J. R. Bower, Jr., Marian Knight Rowe and Frederick E. Rowe, Jr., interposed a cross action wherein they alleged that the issue of proper allocation of the proceeds of sale of oil and gas between income and corpus after December 1, 1946 by Mercantile National Bank at Dallas, trustee, was also in controversy as between themselves and Mary Jane Little and her assignees. The cross complainants requested declaratory relief to the effect that the Mercantile National Bank at Dallas, trustee, be ordered to compute and allocate to corpus depletion based on cost or 27½ per cent, whichever was greater, plus depreciation based on the methods used by decedent, Gloria D. Foster, during her lifetime. The court, by decision dated December 13, 1948, ordered, adjudged and decreed that L. C. Webster, Sol Goodell and T. A. Knight, as executors of the Estate of Gloria D. Foster, deceased, had properly computed depletion and depreciation and allocated correct and proper amounts to corpus for depletion and depreciation as shown by their final account. The court specifically found, in paragraph VIII of its decision, as follows:

In determining the "net income" of decedent's estate, defendant, Mercantile National Bank at Dallas, as Successor Trustee of the Estate of Gloria D. Foster, Deceased, in accordance with the law applicable to said estate at this time, and until otherwise directed by a court of competent jurisdiction, is authorized, required and directed to charge and set aside to corpus reserves for depreciation

on oil and gas lease equipment and machinery, and depletion, in the following manner:

(a) Depreciation: A reserve for depreciation on the oil and gas lease equipment and machinery belonging to said estate, commencing December 27, 1946, to be computed in the same manner and according to the same formula as the decedent did during her lifetime and as plaintiffs have done as shown by their final account, which reserve for depreciation shall be deducted from the proceeds of sales of runs of oil and gas produced by said estate subsequent to December 1, 1946, and set aside to corpus.

(d) Depletion: Out of the proceeds of oil and gas runs produced and sold and to be produced and sold from each oil and gas lease subsequent to December 1, 1946, compute, charge and set aside to corpus 27½% of the gross proceeds of such sales of runs from each lease (but not to exceed 50% of the net income from such lease after deducting the expense and carrying charges on such lease, including depreciation, but not including depletion).

Consistent with its judgment the court decreed that of the $43,091.91 in custody of the executors, $42,379.96 represented corpus of the Estate of Gloria D. Foster, deceased, and $711.95 was net income of said estate. The executors, having previously paid the former sum to Mercantile National Bank at Dallas, trustee, and the latter to Mary Jane Little, deceased, were discharged and acquitted of all other claims arising out of their ad-

ministration. Mary Jane Little excepted to the judgment of December 13, 1948, in open court, and gave oral notice of appeal, but this appeal was not perfected by her and the judgment became final.

Sproles & Woodard, certified public accountants, were the accountants who kept the books and records of Gloria D. Foster and prepared her income tax returns. These same accountants continued to keep the books and prepare the income tax returns of the Gloria D. Foster estate and trust after her death during the entire period here involved. The books of Gloria D. Foster, while living, regularly and consistently made a charge against income and set up a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment in accordance with standard accounting principles. Subsequent to her death, the estate and trust have regularly and consistently set aside to corpus a reserve for depletion of oil and gas properties and a reserve for depreciation of oil and gas equipment. Depletion was computed on the basis of "cost" (which was the practice of Gloria D. Foster while living) by the executors and trustees from August 1943 to December 1946, and thereafter the trust has used "percentage" depletion. Deductions for depletion and depreciation were claimed in the Federal income tax returns, throughout, consistent with the books of Gloria D. Foster, and, later, the books of her estate and trust.

In filing income tax returns for the Gloria D.

Foster Trust, for the years here involved, the trustees computed and claimed as deductions the full amounts of allowable depletion and depreciation as follows:

Year	Depletion Claimed	Depreciation Claimed
1949	$47,011.47	$2,809.01
1950	47,348.24	2,552.21
1951	52,486.87	3,934.42
1952	52,478.44	4,205.44

Mary Jane Little, deceased, in her income tax returns for the years here involved, claimed a share of the deductions for depletion and depreciation allowable in respect of income of the Gloria D. Foster Trust. This share was computed as follows:

MARY JANE LITTLE—1949

Fiduciary Income

Gloria Foster Trust, Mercantile National Bank, Dallas, Texas

I. Net Income of Trust for 1949 per Spriles [sic] and Woodard		$ 92,128.02
Deducted in Determining Net Income:		
Depletion	$ 47,011.49	
Depreciation	2,809.01	49,820.50
Net Income before depletion and depreciation		$141,948.52
Distributed to Mary J. Little in 1949	$ 77,601.94	
Additional Amount distributable	10,926.08	
Total distributable to Mary J. Little 1949	$ 88,528.02	$ 88,528.02

Percentage of total distributable to Mary J. Little 62.3663%

II. Allocation of Income and of Deductions for Depletion and Depreciation

Mary Jane Little	Taxable Net Income Before Deductions	Deductions	Taxable Net Income
62.3663%	$ 88,528.02	$ 31,071.20	$ 57,456.82
Other beneficiaries 2.5361%	3,600.00	1,263.50	2,336.50
Trust 35.0976%	49,820.50	17,485.80	32,334.70
Total 100%	$141,948.52	$ 49,820.50	$ 92,128.02

III. Taxable to Mary Jane Little Before Expense $ 57,456.82
Less Legal Expense 1,602.09
Net Taxable $ 55,854.73

A similar computation was made for each of the years 1950, 1951 and 1952, except for differences in the percentage of total distributable to Mary J. Little, deceased, in each of those years.

The issue is whether Mary Jane Little, deceased, a life beneficiary under the trust created by the will of Gloria D. Foster, was entitled to a portion of the deductions for depreciation and depletion on oil and gas properties held as trust corpus during the years 1949, 1950, 1951 and 1952 or whether the trust itself was entitled to both deductions in their entirety. The specific claim of petitioner is that Mary Jane Little was entitled to 62 per cent of the allowable depletion and depreciation tax deductions, which 62 per cent was the proportion of the income from the trust she received out of the total trust income computed prior to deductions for depletion and depreciation reserves. The issue is con-

trolled by two identical sentences appearing in subsections 23 (l) and 23 (m) of the Internal Revenue Code of 1939[1] providing that "in the case of property held in trust the allowable deductions shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."

Petitioner's basic contention here is that the "instrument creating the trust" was the will of Gloria D. Foster, and that since this will contained no provisions for the apportionment of charges for depletion or depreciation between the trustee and the income beneficiaries, it follows that such charges must be apportioned on the basis of the trust income allocable to each.

Respondent argues the "instrument creating the trust" was the Foster will as modified by the trust agreement of 1944 and the latter agreement by reference to allocation to corpus "in accordance with the provisions of the law applicable at the time" contains a directive as to the apportionment of depreciation and depletion between the trustee and the income beneficiaries which must be followed and this directive gives the trust both deductions in entirety.

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[1]All section references are to the Internal Revenue Code of 1939, as amended, unless otherwise noted.

It is not absolutely clear that petitioner would prevail if the Foster will, standing alone, be accepted as the "instrument creating the trust." However, we do not feel we need examine the trust of the Foster will to see if, properly construed, there is or is not the required apportionment provision.

The Foster will trust was modified by the trust agreement of 1944 and it is the Foster will trust as so modified in 1944 that is the "instrument creating the trust" under which petitioner received the income during all of the years (1949 to 1952, inclusive) that are before us. If there be found in the Foster will trust as modified by the trust agreement of 1944, provisions for apportionment of depreciation and depletion deductions, then under the plain command of subsections 23 (l) and 23 (m), such provisions must be observed and the apportionment made "in accordance with the pertinent provisions of the instrument creating the trust."

The modification of 1944 made many changes in the Foster will trust but the one of interest here is that in paragraph 4, it removed the broad discretion of the trustee to allocate receipts to income and corpus and substituted a provision that the trustee "make this allocation at all times in accordance with the provisions of law applicable at the time without regard to such discretion so granted by said will."

The pertinent provisions of law applicable at this time were embodied in the Texas Trust Act. Acts

1943, 48 Leg., p. 232, ch. 148. This Act specifically provided for the rules to be followed, absent any specific provisions in the trust instrument, in the ascertainment of income and principal and in the apportionment of receipts and expenses between tenants and remaindermen. Section 27 of the Act provides that "All income after deduction of expenses properly chargeable to it, including reasonable reserves, shall be paid and delivered to the tenant * * *." Section 33 of the Act dealing with the situation where the trust property consists of oil properties, such as were owned by the Gloria D. Foster trust, provides that in such a situation "Such percentage * * * as is permitted to be deducted for depletion under the then existing laws of the United States of America for federal income tax purposes shall be treated as principal and invested or held for the use and benefit of the remainderman, and the balance shall be treated as income subject to be disbursed to the tenant or person entitled thereto * * *."

The trust agreement of 1944, by reference to "the law applicable at the time", in paragraph 4, makes the foregoing statutory law of Texas a part of the agreement. It amounts to a provision of the trust instrument directing the apportionment of the allowable deductions between the income beneficiaries and the trustee, and the apportionment must be made in accordance with such provision. When we read the provisions of the foregoing statutory law of Texas into the trust agreement of 1944, it is

clear that the trust is entitled to take the depreciation and depletion deductions in their entirety.

Our view that the settlement agreement and the new trust agreement in 1944 must be considered as an integral portion of the instruments creating the trust is reinforced by the decision of the District Court of Dallas County, Texas in 1948. That court was called upon to approve a final accounting of the former trustees and also to decide the issue of the proper allocation to be made by the new trustee as to allocation of the proceeds of the sale of gas and oil between income and corpus. In reaching its decision interpreting the rights of various beneficiaries under the trust, the court followed the Gloria D. Foster will as modified by the new trust agreement of 1944. In our findings of fact we have set forth a portion of the court's decree that decided the issue of the cross action between the life income beneficiary, Mary Jane Little, and the remaindermen and trustee, Mercantile National Bank, as to the allocation of trust receipts. There the court determined the "net income" must be determined "in accordance with the law applicable to said estate at this time" and it in effect stated the applicable law was a direction to the trustee to allocate all depreciation and depletion to the trust. Mary Jane Little did not appeal from this decision.

Petitioner seems to imply that if we look beyond the borders of the original will we will be violating

the expressed intent of the testatrix. The argument is that if the testatrix "desired the trust instrument to have the effect for which respondent here contends, such effect could have been assured by a simple directive in the Will requiring the Trustees to set aside to corpus amounts equal to allowable depletion and depreciation. That she did not do so must be taken to mean that she did not intend to restrict the distribution of income to such an extent." However, if we were to look to the intent of the testatrix, we would arrive at a similar result. During her lifetime the books and records covering her oil operations show a regular and consistent charge against income, and a corresponding reserve for depletion of oil and gas properties and for depreciation of oil and gas equipment in accordance with standard accounting principles. This fact no doubt persuaded the Texas District Court to hold that when the testatrix in her will specified that the "net income" of the trust was to be paid to Mary Jane Little, the life beneficiary, she had in mind the trust receipts less the depletion and depreciation deductions.

Served July 21, 1958.

Decision will be entered for the respondent.

Tax Court of the United States
Washington

Docket No. 58688

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed July 21, 1958, it is

Ordered and Decided: That there are deficiencies in income tax, as follows:

Year	Deficiency
1949	$22,899.07
1950	23,909.64
1951	29,912.41
1952	30,731.00

[Seal] /s/ JOHN E. MULRONEY,
Judge.

Entered: July 21, 1958.

Served: July 23, 1958.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DECISION OF TAX COURT

The above-named petitioner, by its counsel, Wilson B. Copes, hereby petitions for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on July 21, 1958, 30 T. C. ....No. 98, determining deficiencies in the decedent's federal income taxes for the calendar years 1949, 1950, 1951 and 1952 in the respective amounts of $22,899.07, $23,909.64, $29,912.41 and $30,731.00, and respectfully shows:

I.

The controversy relates solely to the question of the proper allocation of the deductions for depletion and depreciation between the income beneficiary and the fiduciary of a trust, the principal income of which was proceeds from the operation of oil producing properties. The question is governed by portions of Sections 23 (l) and 23 (m) of the Internal Revenue Code of 1939.

It was the decision of the Tax Court herein that the fiduciary was entitled to the entire deductions for depletion and depreciation and that the income beneficiary was entitled to none. It is the contention of the petitioner that the decedent was entitled to that portion of the total of such deductions which her distributable portion of the net

receipts of the trust bore to the total net receipts of the trust.

II.

The review is sought before the United States Court of Appeals for the Ninth Circuit.

III.

The petitioner's decedent at all times mentioned herein resided in the County of Los Angeles, State of California, and said decedent filed her income tax returns for the years here involved with the Collector or District Director of Internal Revenue at Los Angeles, Sixth District of California.

The place where the petitioner's decedent resided, and the place where the office of said Collector or District Director of Internal Revenue is located, are within the Circuit for the United States Court of Appeals for the Ninth Circuit, and said Court is the Court having jurisdiction of a review of the decision of the Tax Court herein under the provisions of Section 7482 of the Internal Revenue Code.

The decision of the Tax Court was entered herein on July 21, 1958, and the time for filing a Petition for Review will expire October 19, 1958.

Wherefore, your petitioner prays that a review be had of the decision of the Tax Court rendered in the above-entitled matter, and that upon such review said decision be reversed.

Respectfully submitted,

/s/ WILLIAM L. KUMLER,
/s/ WILSON B. COPES,
Attorneys for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed September 30, 1958.

[Title of Tax Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW

To Arch M. Cantrall, Chief Counsel, Internal Revenue Service:

You are hereby notified that on September 30, 1958, Bank of America National Trust and Savings Association, as Executor of the Estate of Mary Jane Little, deceased, the petitioner herein, filed a Petition for Review of the Decision of the Tax Court heretofore rendered herein. There is delivered to you herewith a copy of the Petition so filed.

Dated: September 30, 1958.

/s/ WILSON B. COPES,
Attorney for Petitioner.

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed October 3, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", excepting the original exhibits which are separately certified, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of December, 1958.

[Seal] HOWARD P. LOCKE,
Clerk of the Court
/s/ By GERTRUDE W. COLL,
Deputy Clerk.

[Endorsed]: No. 16308. United States Court of Appeals for the Ninth Circuit. Estate of Mary Jane Little, Deceased, Bank of America National Trust and Savings Association, Executor, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: December 19, 1958.

Docketed: December 31, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

1. Docket Entries of all proceedings before the Tax Court of the United States.

2. Pleadings before the Tax Court of the United States as follows:

(a) Petition.

(b) Answer.

(c) Amendment to Answer.

(d) Reply.

3. Stipulation of Facts, including the following exhibits: 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H (1) through (15), both inclusive.

4. Findings of Fact and Opinion of the Tax Court.

5. Decision of the Tax Court.

6. Petition for Review.

7. Notice of Filing Petition for Review.

8. Designation of Contents of Record on Review.

9. Statement of Points on Which Petitioner Will Rely.

10. This Designation of Record by Petitioner.

/s/ WILLIAM L. KUMLER,
/s/ WILSON B. COPES,
Attorneys for Petitioner.

[Endorsed]: Filed January 6, 1959. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 16308

ESTATE OF MARY JANE LITTLE, Deceased, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH PETITIONER WILL RELY

1. The Tax Court of the United States erred in concluding that the Texas Trust Act, Acts 1943, 48 Leg. p. 232, CH. 148, when read into a trust instrument "amounts to a provision in the trust instrument directing the apportionment of the allowable deductions between the income beneficiaries and the trustees * * *" [Emphasis supplied] as such apportionment is contemplated by Sections 23 (l) and 23 (m) of the Internal Revenue Code of 1939.

2. The Tax Court of the United States erred in finding that the instrument creating the trust was the Foster Will as modified by the trust agreement of 1944.

3. The Tax Court of the United States erred in concluding that the manner in which the decedent, Gloria Foster, kept her books and records during her lifetime indicated a testamentary intention with respect to the allocation of deductions for depletion and depreciation.

4. The Tax Court of the United States erred in holding that there is a deficiency in the petitioner's federal income taxes for the following years in the following amounts:

Year	Deficiency
1949	$22,899.07
1950	23,909.64
1951	29,912.41
1952	30,731.00

/s/ WILLIAM L. KUMLER,
/s/ WILSON B. COPES,
Attorneys for Petitioner.

[Endorsed]: Filed January 6, 1959. Paul P. O'Brien, Clerk.
[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD BY PETITIONER

Pursuant to Rule 17(b) of this Court, petitioner does hereby designate the following for inclusion in the printed record.

No. 16,322

United States Court of Appeals

For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,

Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

APPELLANTS' OPENING BRIEF.

ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. MCCOMISH,
1811 Mills Tower,
San Francisco 4, California,
Attorneys for Appellants.

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No. 16,322

United States Court of Appeals
For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,
Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,
Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF JURISDICTION.

On October 30, 1958, the U. S. District Court for the Northern District of California, made and entered herein its memorandum and order affirming the order, judgment and decree of March 25, 1958 entered by the referee in bankruptcy in this proceeding, which judgment was entered again appellants and in favor of appellee in the sum of $647,627.47 upon the objections of appellee to the proof of claim filed by appellants in the bankruptcy proceedings of Snow Camp Logging Co., a copartnership. (T.R. pp. 71-85.) This relief was granted by the referee and affirmed by the District Court upon the trustee's petition for an order

disallowing the claim in question and for judgment for affirmative relief. Notice of Appeal (T.R. pp. 85-86) was timely filed on November 19, 1958. (11 U.S.C.A. 48; Bankruptcy Act Section 25.) Jurisdiction of this Court to review the Order of the District Court is supported by Statute 11 U.S.C.A. 47. (Bankruptcy Act, Sec. 24.)

STATEMENT OF QUESTIONS PRESENTED.

The following are the questions presented on appeal to this Court:

1. Did the bankruptcy court have summary jurisdiction not only to hear but to grant the trustee's petition for affirmative relief against appellants? (T.R. pp. 31-33.)

2. Where the subject matter of the trustee's said petition for affirmative relief against appellants (hereinafter for brevity referred to as his "counterclaim") was clearly involved in a state court proceeding which was at issue and ready to be tried before the bankruptcy proceedings in question were commenced, was the bankruptcy court bound by comity to refrain from enjoining and to permit the state court action to proceed without interference from the bankruptcy court?

3. Can a trustee in bankruptcy maintain a counterclaim against a creditor of the bankrupt for damages for breach of a contract, which contract had been assigned before bankruptcy by the bankrupt to a corporation which was not a party to the bankruptcy proceedings?

4. Was there any anticipatory breach by the bankrupt of the contract for the alleged breach of which by appellants the trustee was granted judgment?

5. Was the amount of the damages awarded to appellee against appellants excessive and/or was it supported by competent credible evidence?

SPECIFICATION OF ERRORS.

The "Statement of Points on Appeal" filed herein (T.R. pp. 549-552) gives in detail the various points relied upon by appellants. They are as follows:

The United States District Court for the Northern District of California, Northern Division, erred:

(1) In affirming a finding of the referee in bankruptcy, that the bankrupt, Snow Camp Logging Company, a corporation, was the owner and is now the owner of any claim or cause of action against either S. A. Peters or Timber, Inc., of California, appellants herein.

(2) In affirming a finding by the referee in bankruptcy that there is even one scintilla of testimony or documentary proof in the record in support of the allegation made by the trustee for his order to show cause directed to appellants that the assignment by the bankrupt partnership to a corporation of the contract between appellants and the bankrupt was made without any consideration and that it remained as a valuable asset of the partnership and was not owned by the assignee corporation.

(3) When it affirmed the action by the referee in bankruptcy restraining an action pending in the Superior Court of the State of California, in and for the County of Humboldt, which action had long been pending at the time of the filing of the petition in bankruptcy and which related to the same subject matter as the trustee's objections to the claim of appellants.

(4) When it affirmed a finding of the referee in bankruptcy and held that there had been no accord and satisfaction between the bankrupt and appellants.

(5) When it affirmed the action of the referee in bankruptcy in overruling the objection to the jurisdiction of the bankruptcy court and refused to abate the proceedings in the bankruptcy court.

(6) When it affirmed the action of the referee in bankruptcy in refusing an offer of appellants to prove that the bankrupt partnership entered into a written contract to deliver gang logs elsewhere than to appellants, contrary to its contract.

As indicated in the transcript of record (pp. 364-382), a series of questions was asked of the bankrupt, Clarence C. Vander Jack, by counsel for appellants, with the obvious purpose of eliciting proof from the witness that, notwithstanding the provisions of trustee's Exhibit No. 1 (T.R. pp. 6-12) and particularly to paragraph No. 8 thereof:

> "8. Sellers shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production upon *that type of log.* In the event buyer ceases production upon any type of

> log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers,'' p. 8.

the bankrupt had, during the period July-October 21, 1953, contracted with and delivered logs to others than appellants in substantial quantities, and thus had itself breached the agreement of June 1, 1951. In particular, the referee improperly rejected the offer of appellants to introduce in evidence the ''Memorandum of Agreement'' (undated) between the bankrupt and Western Studs. This memorandum of agreement is set forth in haec verba in the record. (T.R. pp. 379-382.)

In view of the fact that the referee, without objection by appellee, permitted the following question to be asked of the same witness and the following answer given

> (T.R. p. 365—''Q. Did you have contracts with anybody else to sell them logs during this period of time?
>
> A. You brought that up in the deposition. I looked in my records, and *we did have.''* (Italics ours.)

We observe that, regardless of the grounds for objection thereafter urged on behalf of appellee to the subsequent questions asked of the witness by appellants, and to the introduction of the Western Studs agreement in evidence, the referee's rulings on this evidence and his rejection of the Western Studs agreement were not only erroneous but clearly prejudicial. We have,

therefore, in view of the length of the proceedings involved leading up to the final rejection of appellants' offer of proof (T.R. pp. 379-383) set forth "the full substance of the evidence rejected" in Appendix "A" hereof.

(7) When it affirmed the action of the referee in bankruptcy in sustaining an objection and refusing an offer of proof by appellants that the bankrupt corporation did in fact deliver substantial quantities of gang logs to other persons than appellants contrary to its contract.

(8) In affirming the amount of damages computed and awarded by the referee in bankruptcy against appellants.

(9) In affirming an award of damages made by said referee in bankruptcy in favor of appellee and against appellants in the sum of $674,627.40.

(10) In affirming a ruling by the referee in bankruptcy that the jurisdiction of the bankruptcy court was superior to that of the Superior Court of Humboldt County, where the jurisdiction of Humboldt Superior Court had attached prior to the filing of the petition in bankruptcy.

(11) In affirming the action of the referee in bankruptcy in ruling that comity did not compel the trustees to continue the State Court action which was first begun long prior to the filing of the petition in bankruptcy.

(12) In affirming the action of the referee in bankruptcy in enjoining appellants and appellants' attor-

neys from proceeding in the State Court action in Humboldt County.

(13) When it refused to vacate the ex parte orders dated March 26, 1958 and April 11, 1958 both obtained without notice to appellants.

(14) When it made its order dated October 30, 1958, affirming the judgment and decree of March 25, 1958 entered by the referee in bankruptcy in the above-entitled action for which appellants sought review.

STATEMENT OF PROCEEDINGS.

On or about June 1, 1951, Clarence Vander Jack and Clarence C. Vander Jack, partners doing business as Snow Camp Logging Company (hereinafter referred to as the "Bankrupt") as Sellers, entered into an agreement with appellant, S. A. Peters (Trustee's Exhibit No. 1, T.R. pp. 6-12), for the delivery by the bankrupt to appellant of logs. Thereafter, under the provisions of paragraph 12 of said agreement, appellant, S. A. Peters, assigned said agreement to appellant, Timber, Inc., a corporation. On December 14, 1953 "Snow Camp Logging Company, a corporation", as plaintiff, filed in the Superior Court of the State of California, in and for the County of Humboldt (No. 28851), a complaint for money due and for breach of the contract against appellants. This action was for the recovery of alleged damages in the sum of $1,045,493.39. On March 4, 1954, the appellants filed their answer and cross-complaint in said Superior

Court action. (T.R. p. 40; also, T.R. pp. 22-30.) On March 11, 1954, the answer of the plaintiff to said cross-complaint was filed and a memorandum of motion to set that Superior Court action was filed. (T.R. p. 40.) On February 14, 1955, the bankrupt filed its voluntary petition in bankruptcy as a partnership, together with the members of said partnership individually. On July 16, 1956, a substitution of attorneys for the plaintiff in said Superior Court action was filed whereby Messrs. Max H. Margolis and Frederick L. Hilger, the present attorneys for the trustee in bankruptcy and appellee herein, were made attorneys of record for the plaintiff in that action, and on the same day the plaintiff demanded a jury trial and jury fees were deposited with the clerk of that court. (T.R. p. 41.) On August 17, 1956, notice of time and place of trial was filed by said attorneys for the plaintiff fixing the trial for October 1, 1956 at Eureka, California, and on October 8, 1956 the action was reset for trial on November 26, 1956.

In the interim, and on January 11, 1956, appellants filed with the referee in bankruptcy their claim against the estate of the bankrupt for alleged damages in the sum of $900,000.00 by reason of the alleged breach by the bankrupts of the same agreement of June 1, 1951. (T.R. pp. 3-30.) Thereafter, and on October 3, 1956, the trustee in bankruptcy filed his "Petition for Order Disallowing Claim under Section 57d of the Bankruptcy Act" and for Judgment for Affirmative Relief (T.R. pp. 31-33) and the referee on said date issued his order to show cause to which appellants were re-

spondents (T.R. p. 34) which was returnable before the referee on November 7, 1956. On November 7, 1956, appellants filed with the referee their motion for order authorizing the withdrawal of their said proof of claim (T.R. pp. 37-38) and an affidavit in support thereof (T.R. pp. 35-37), and at the same time filed their return to said order to show cause, their motion to discharge same, and their plea in abatement. (T.R. pp. 39-43.) Appellants' motion to withdraw their proof of claim in question was denied by the referee on November 7, 1956, and thereafter, and on November 27, 1956, appellants filed their bill of particulars in support of the proof of claim in question. (T.R. pp. 43-44.)

The trustee's petition for order disallowing claim and for judgment for affirmative relief was heard by the referee in bankruptcy on November 7, December 5, and December 6, 1956, and on January 21 and 22, 1957. During the course of these proceedings and on December 6, 1956 upon the ex parte motion of the trusteee, without any prior notice, written or otherwise, to appellants, the referee restrained appellants from taking any further proceedings in the state court action and directed that all proceedings in connection with the trustee's counterclaim be litigated in the bankruptcy court in this summary fashion. Due objection to these rulings of the referee was made by appellants. (T.R. pp. 161-162.) After written argument of the cause (which was submitted for decision on January 22, 1957) the referee gave his notice of decision on February 24, 1958 (T.R. pp. 44-47) and on

March 22, 1958, the referee signed and filed his findings of fact and conclusions of law (T.R. pp. 47-55), and on March 25, 1958 entered his order, judgment and decree. (T.R. pp. 55-56). On March 28, 1958, appellants timely filed their petition for review of the referee's order, judgment and decree of March 25, 1958. On April 11, 1958, the District Court ordered writs of execution upon the judgment to be issued, over the objection of the appellants (T.R. pp. 66-68), and on June 18, 1958 the referee in bankruptcy filed with the District Court his certificate and report on the petition for review. (T.R. pp. 68-71.)

After due argument of the petition for review by counsel for the respective parties, on October 30, 1958, Hon. Sherrill Halbert, U.S. District Judge for the Northern District of California, by his memorandum and order (T.R. pp. 71-85) affirmed the referee's order, judgment and decree of March 25, 1958, and from this latter order this appeal has been perfected.

STATEMENT OF FACTS.

Under the agreement of June 1, 1951 between the bankrupt and appellants, appellants commenced construction of the "gang-type saw mill" before August 1, 1951 and completed it with reasonable diligence so that shortly thereafter the bankrupt commenced to deliver and appellants received and processed in their said gang mill substantial quantities of logs. This relationship continued until about October 21, 1953, at which time the bankrupt stopped delivering logs. During this whole period of time payments were promptly

made by appellants for all logs delivered by the bankrupt. However, beginning in July of 1953, a dispute arose between the bankrupt and appellants concerning the quality, use and the applicable price of the logs delivered to appellants by the bankrupt. Appellants made semi-monthly payments for the logs at the price considered by them to be proper for the quality of logs in question. Despite this dispute, the bankrupt accepted and cashed appellants' checks therefor, each of which bore the acknowledgment (by endorsement) that the check was "in full payment for logs delivered" during the two-weeks' period, in question. (Trustee's Exhibits Nos. 6-12, incl.) Appellants contended that the logs were not gang-type logs as described in paragraph 5 of the agreement of June 1, 1951 (T.R. p. 8) and that they were more than 40% defective. At all times from the opening of the mill to October 21, 1953, appellants' mill operated at full capacity and production, but continually objected to taking logs which were not of the quality specified in the contract.

During all of this same period of time, the bankrupt delivered 60% of its logs to others than appellants, including logs which, under the provisions of paragraphs 3 and 5 of the agreement (T.R. pp. 7-8), appellants were entitled to have delivered to them. Appellants were at all times ready, willing and able to perform their obligations under the agreement but, on and after October 21, 1953, the bankrupt stopped delivering logs and refused thereafter to do so. A controversy had also arisen between the parties during

the period between July and October, 1953 concerning the "jamming" of the log pond at appellants' mill Appellants did all they could to prevent such jamming, but the bankrupt continued to send truckloads of logs to the pond at so rapid a rate as to make it impossible to keep the pond from being jammed with logs.

After October 31, 1953, there were no further deliveries of logs under the agreement of June 1, 1951, and, after correspondence between the bankrupt, appellants, and their respective counsel, the suit for damages was filed by Snow Camp Logging Company, a corporation, on December 14, 1953, upon which the trustee's petition for affirmative relief (counterclaim) in this matter is predicated. (T.R. pp. 32-33.)

ARGUMENT.

I. THE BANKRUPTCY COURT DID NOT HAVE SUMMARY JURISDICTION TO HEAR THE TRUSTEE'S PETITION FOR AFFIRMATIVE RELIEF AND TO GRANT AFFIRMATIVE RELIEF AGAINST APPELLANTS.

As is indicated in the memorandum and order of the district judge (T.R. p. 72):

> "Before the date set for the hearing on the order to show cause, petitioners (Appellants) appeared specially to object to the jurisdiction of the bankruptcy court on the ground that there was then pending in the Superior Court of the State of California, in and for the County of Humboldt, an action entitled Snow Camp Logging Co., a corporation, plaintiff, vs. S. A. Peters and Timber Incorporated of California, defendants,

and that the subject matter of said action was the same as that embodied in the Trustee's petition for affirmative relief. This objection was overruled by the Referee."

This was not a preference action and, in addition to the foregoing objection appellants timely filed their motion for permission to withdraw their claim, upon similar grounds. We believe that the mere filing of the claim by appellants did not constitute such consent as would grant to the bankruptcy court the summary jurisdiction to hear, determine and award the affirmative judgment against appellants which was done by the referee. As also was observed by the district judge, this court "has not spoken directly on the matter". (T.R. p. 82.) The original inclination of this court in support of our opposition to any such implied consent to such summary jurisdiction is found in *In re Continental Producing Co.,* 261 F. 627; *In re Bowers,* 33 F. Supp. 965.

See also,

In re Gross, 121 F. Supp. 38;

B. F. Avery & Sons Co. v. Davis, 192 F. 2d 255 (5th Cir.) cert. den. 342 U.S. 945;

In re Tommie's Dine & Dance, 102 F. Supp. 627.

This position is also supported by the decisions in *In re Houston Seed Co.,* 122 F. Supp. 340; *Duda v. Sterling Mfg. Co.,* 178 F. 2d 428; 14 A. L. R. 2d 899.

See also,

Harrison v. Cumberland, 271 U.S. 191;

Cline v. Kaplan, 323 U.S. 197.

Under certain circumstances, the broad rule for which we contend has been limited by some courts to the extent that by the filing of the claim the claimant consented to a summary adjudication of a counterclaim, but not in an amount exceeding the claim. (i. e., that no affirmative relief may be granted.)

Metz v. Knobel, 21 F. 2d, 317;

In re Florsheim, 24 F. Supp. 991;

Fitch v. Richardson, 147 F. 197;

Whereas here, the sole basis of appellee's counterclaim was not any preferential or fraudulent transfer by the bankrupt to appellants, but, rather, amounted to an unliquidated claim for damages for an alleged breach of a contract (the status of which controversy in the state court, prior to bankruptcy, will hereafter be more fully discussed), we believe that the rule of the Fifth Circuit on this question should be followed by this court.

II. COMITY REQUIRED THAT THE BANKRUPTCY COURT SURRENDER JURISDICTION OVER THE SUBJECT MATTER OF THE TRUSTEE'S COUNTERCLAIM AGAINST APPELLANTS TO THE STATE SUPERIOR COURT.

a. **The subject matter was at issue, ready and set to be tried by the State Court on October 1, 1956; and**

b. **The injunction issued by the Referee against Appellants' proceeding with the State Court action on their claim and/or their defense of what is now the Trustee's counterclaim, was issued ex parte without notice to Appellants of the grounds for such motion for injunction and without an opportunity for Appellants to fully reply thereto.**

On the 14th day of December, 1953, the bankrupt's assignee filed an action against appellants in the Su-

perior Court for Humboldt County for damages for breach of the contract which is the subject matter of the litigation at bar. Appellants thereafter filed an answer and cross-complaint and the action was at issue. (Claimant's Exhibit No. 1 and T.R. p. 39.) On February 14, 1955 (T.R. p. 48), Snow Camp Logging Co. and its partners filed a voluntary petition in bankruptcy and appellee was appointed trustee of the estates of said bankrupts. Thereafter, the attorneys for appellee were substituted as attorneys of record for plaintiff in the Superior Court action. The plaintiff then demanded a jury trial and the matter was set for October 1, 1956 (T.R. p. 4) and later reset for November 26, 1956. (T.R. p. 41.)

In the interim, appellants filed their claim in the bankruptcy case arising from the same agreement of June 1, 1951. (T.R. pp. 3-30.) The trustee, on October 3, 1956, filed his petition for order disallowing claim and for affirmative relief (T.R. pp. 31-34) which was returnable before the referee on November 7, 1956. On this date, appellants filed with the referee their motion for order authorizing withdrawal of claim and their plea in abatement. (T.R. pp. 37-43.) Appellants' motion was denied and trial before the referee proceeded. At the end of the first day of trial on November 7, 1956, upon an oral ex parte motion, without notice of any kind to appellants and without any showing whatever, and over appellants' objection, the referee restrained appellants from proceeding further in the state court and directed that the proceedings in connection with trustee's counterclaim be litigated

in the bankruptcy court in a summary fashion. (T.R. pp. 161-162.)

The referee in refusing to allow appellants to proceed in the state court completely disregarded the principle of comity between the state and federal courts. This action deprived appellants of their right to have their cause tried in a plenary action before a jury. It forced them to submit to a summary trial on a counterclaim, title to which had passed from the bankrupt by assignment prior to the filing of the petition herein. (This phase will be more fully discussed subsequently in this brief.)

The bankruptcy court has no right to issue an injunction or restraining order arbitrarily and one will not be issued when good conscience will not require it. A showing must be made that to permit the state court action to continue would allow an interference with the due administration or jurisdiction of the bankruptcy court or that the pressing of the state court action would be irreparably injurious to the rights of the other parties. *Brehme v. Watson,* 9th Cir., 67 Fed. 2d, 359, wherein Judge Garrecht stated, in his opinion, at p. 361:

> "The authorities are agreed that the bankruptcy laws merely give to courts of bankruptcy full power to enjoin all persons within their full jurisdiction from doing any act that will interfere with or prevent its due administration, or injury to the parties, and not otherwise."

The court further points out the necessity for a showing to be made for the issuance of the restraining order.

"The question thus presents itself: Should this court, upon the filing of an involuntary petition in bankruptcy, *as* of course, and *without any allegation or proof of a threatened invasion of the rights* of any creditor, issue its injunction enjoining the further prosecution of a suit in a state court for a provable debt against the (alleged) bankrupt, because of the *mere possibility of action* being taken which will be *injurious* to the rights of *creditors,* and in the absence of an application to such state court for the proper relief therein? I cannot believe that such question should be answered in the affirmative."

Behind Judge Garrecht's decision just quoted is found a beautifully phrased decision, *In re: French,* 18 Fed. 2d, 792 (U.S.D.C. Montana) the following:

"The relation between the state and federal courts was clearly stated in the case of *Covell v. Heyman,* 111 U. S. 176, 182, 4 S. Ct. 355, 358; 28 L. Ed. 390, where it is said: 'The forbearance which courts of coordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior."

The court went on to say:

"There is another phase of the case which requires comment. The action here sought to be enjoined was instituted in the state court on September 15, 1923. On October 17, 1923 the defendant filed a plea of general issue with notices of special defenses. The bill of complaint for injunction was not filed in this court until December 7, 1925. Defendant having thereby submitted to the jurisdiction of the state court is entitled to a stay of proceedings by injunction by this court only upon showing clear and undoubted right thereto. He must now exhaust his limit in the state court. Should it then appear that the enforcement of any judgments which may be obtained against plaintiff will be contrary to the recognized principle of equity and the standards of good conscience or would have the effect of impairing the jurisdiction of this court, this court may then prevent that result by means of injunction. (citing cases). The restraining order heretofore issued will be and the same is hereby dissolved."

The same principle was announced in *Murphy, et al v. Bankers Commercial Corporation,* 203 F. 2d 645, U. S. Circuit Court of Appeals, 2d Circuit, April 6, 1953. A decision by Judge Augustus N. Hand which cites *Brehme v. Watson,* supra.

The restraining order issued by the referee was on oral motion and without notice. The record on this portion of the proceeding is as follows (T.R. pp. 161-162):

"Mr. Margolis. I would like to ask for an order at this time restraining counsel and the claim-

ants from proceeding, until this matter is determined before this Court, with any action in the Superior Court of Humboldt County, and in support of my motion I will call your Honor's attention to the case cited in claimant's memorandum which is on file. I believe it is in re Corcoran. This Court has the right, pending the determination of the matter . . .

The Referee. I don't think there is any question about that.

Mr. Stark. I do not think you are entitled to have an Order enjoining the Superior Court.

Mr. Margolis. I did not say the Superior Court. I said proceeding up there.

(Testimony of S. A. Peters)

Mr. Stark. The effect is the same. He is aware of the cases that hold your Honor hasn't jurisdiction to restrain the State Court.

The Referee. I understand that. I am going to restrain counsel and I am going to restrain the plaintiff from proceeding in the State Court until this is disposed of at least.

Mr. Stark. Don't you think we are entitled to a pleading?

The Referee. Not under the circumstances.

Mr. Goodwin. You mean we are not going to be restrained by a written order?

The Referee. I will give you a written order yes, if you want a written order.

Mr. Goodwin. We would prefer it.

The Referee. I will sign an order to that effect but the restraining order dates from this minute.

Mr. Margolis. That restraining order will remain in full force and effect until it is lifted by an order of this court?

The Referee. That is correct."

Thus, it will be seen that there was absolutely no showing of the interference or irreparable injury required by the courts as a basis for the issuance of such a restraining order.

III. THE FINDING OF THE DISTRICT COURT THAT THE BANKRUPT WAS, AT THE TIME OF THE COMMENCEMENT OF THE BANKRUPTCY PROCEEDINGS, THE OWNER OF THE RIGHTS AND PROPERTY IN THE AGREEMENT OF JUNE 1, 1951 IS NOT SUPPORTED BY THE EVIDENCE.

(Finding No. 19, T.R. p 52)

In order for the referee to give appellee any relief on his counterclaim, appellee was required to prove that he was entitled to have judgment. A counterclaim is in the nature of a complaint against appellants. All material allegations, not admitted, are deemed denied and must be proven. While it is true that a referee's findings and/or the findings of a district judge based on conflicting evidence would not generally be disturbed by this court on appeal, such rule would not apply to a finding based on no evidence whatsoever, or to an inference drawn from uncontradicted evidence.

Costello v. Fazio (9th Cir.) 256 F. 2d, 903;
In re Morasco (2nd Cir.) 233 F. 2d, 11/15;
Sheldon v. Waters (5th Cir.) 168 F. 2d, 927.

The record of the Superior Court proceedings (Claimant's Exhibit No. 1, printed as Exhibits B, C and D, T.R. pp. 13-30), reveals the following undisputed facts: The complaint filed therein (T.R. pp. 13-14) alleges that the rights of the bankrupt were as-

signed to the corporate plaintiff in the Superior Court action. This allegation was *admitted* by appellants' failure to deny the same in their answer. (T.R. pp. 22-30.) This same allegation is set forth in appellee's petition for order disallowing claim and for judgment for affirmative relief (T.R. p. 32), but adds that the assignment was "without any consideration whatsoever" and that said claim "is a valuable asset of the estate of said bankrupt copartnership".

> "That prior to the bankrupt(cy) partnership, Snow Camp Logging Company, *without any consideration whatsoever,* assigned its claim against the aforesaid defendants to Snow Camp Logging Co., a corporation, and said claim is a valuable asset of the estate of said bankrupt copartnership, Snow Camp Logging Company;"

The italicized portion of the allegation was asserted here for the first time and with which appellants took issue. (T.R. p. 42, paragraphs IV and VI.) Thus appellee, as the party asserting and seeking a recovery under this allegation, bore the burden of proving it.

Dept. of Water and Power v. Anderson, (9th Cir.) 95 F. 2d, 577;

Howells State Bank v. Novotney, (8th Cir.) 231 F. 2d, 259.

This applies to special defenses, counterclaims and cross-complaints.

New York Life Ins. Co. v. Rogers, (9th Cir.) 126 F. 2d, 784;

Allis-Chalmers Mfg. Co. v. U. S., 79 Ct. Cl., 453.

There is not one word of evidence, oral or documentary, in the entire record, that was even offered on this subject during the entire trial. There is absolutely nothing in the entire record to negate, qualify or explain the admitted fact that, *prior* to the filing of the petition in bankruptcy, the bankrupt had assigned its rights in the contract (T.R. p. 90) to Snow Camp Logging Company, *a corporation,* the plaintiff in the Superior Court proceedings. Appellee did not offer one word in support of its allegation that the assignment was without consideration and/or that the bankrupt was the owner of the rights under the contract at issue, nor did he offer any evidence, oral or documentary, of any reassignment of the contract.

The District Court in discussing the point made above said in its memorandum and order (T.R. p. 74):

> "A specific finding of the Referee on this point (Referee's Finding of Fact No. 19 reads: 'that at the time of the filing of the petition in bankruptcy herein, said bankrupts owned the rights and property in and to said writing * * *') is attacked on the ground that there is not one scintilla of evidence, either oral or documentary, to support that determination. This fact is without foundation. The only record before this court is the transcript of the proceedings had to determine which party breached the contract, and the extent of the damages. *The issue of ownership was decided adversely to petitioner before that time.* Lacking a coherent statement of facts by either party, it is impossible to determine the exact course of events which surrounded the Referee's conclusions that the contract did, in fact, constitute an asset of the bankrupt estate."

There is no support whatever in the record for the statement italicized above. It was in this very proceeding between appellee and appellants that this issue was, for the first time, decided adversely to appellants (Referee's Finding No. 19, T.R. p. 52) and without any supporting evidence.

It will be borne in mind that the complaint in the Humboldt County state court action alleged that there had been assignment of the Peters contract from the bankrupt co-partnership to a non-bankrupt corporation. It will also be recalled that the petition of the trustee of the bankrupt co-partnership alleged "that prior to the bankruptcy partnership Snow Camp Logging Company without any consideration whatsoever assigned its claim against the aforesaid defendants to Snow Camp Logging Company, a corporation, and said claim is a valuable asset of the estate of said bankrupt co-partnership Snow Camp Logging Company." Aside from the fact that there was no effort made to make any proof of the foregoing allegation in the petition of the trustee for an order to show cause either orally or in documentary form, it is respectfully submitted that it is the law that a pleading containing an admission is admissible against the pleador in a proceeding subsequent to the one in which the pleading is filed on behalf of a stranger to the former action or a party to the former action.

White v. Mechanics Securities Corp. (1925) 269 U. S. 283, 70 L. ed. 275, 46 S. Ct. 116;

Lehigh Valley R. Co. v. Allied Machinery Co. (1921; C.C.A. 2d) 271 Fed. 900 (writ of cer-

tiorari denied in (1921) 256 U. S. 704, 65 L. ed. 1180, 41 S. Ct. 625, and writ of error dismissed in (1921) 257 U. S. 614, 66 L. ed. 398, 42 S. Ct. 93);

Nelson Bros. Coal Co. v. Perryman-Burns Coal Co. (1930; D. C.) 43 F. (2d) 564 (reversed on other grounds in (1931; D. C.) 48 F. (2d) 99).

And this is a rule not only in the courts of the United States but in courts of practically all of the States of the Union. Thus it follows that the appellants having introduced into evidence the complaint in the Humboldt County action were entitled to rely upon the undenied allegations of the complaint therein and the trustee in bankruptcy in his failure to support the allegation made in his petition for an order to show cause that the assignment was made to the corporation which is not bankrupt was invalid because of a lack of consideration, finds no support whatsoever in the record either oral or documentary.

The foregoing quotation from the memorandum and order of the district court in affirming the order, judgment and decree of the referee in bankruptcy becomes even more startling when this court becomes aware of the fact that the entire record, every word of testimony and every exhibit that was introduced before the referee was included in his certificate that went to the district court on the petition of appellant for review. There could not, therefore, have been a determination of the issue of ownership adversely to the petitioner before the beginning of the hearings before the referee. If there had been any such deter-

mination by the referee relative to the ownership of the contract, it must have been arrived at in the absence of appellants in the proceedings and must have been arrived at without any opportunity of appellants to have been heard in that regard.

Thus, as the record stood before the referee, the district judge and now before this court, it shows without dispute that this contract of June 1, 1951 was assigned before bankruptcy to Snow Camp Logging Company, a corporation, and that title to the same still remains therein. The finding of the district judge (T.R. p. 74) based on the referee's finding (T.R. p. 52) is not only without support but without any attempt having been made to support it.

IV. a. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS NO ANTICIPATORY BREACH BY THE BANKRUPT, PRIOR TO THE ALLEGED BREACH BY APPELLANTS, OF THE AGREEMENT OF JUNE 1, 1951.

Appellants' contract with appellee provided, among other things (T.R. p. 7):

> "3. That sellers agree to furnish and buyer agrees to purchase all the logs required by buyer in the operation of any or all of the mills in the Redwood Creek Ranch area."

In an endeavor to show that the bankrupt had committed an anticipatory breach of its contract, which would entitle appellants to refuse to receive his logs and to seek them elsewhere, appellants offered to prove that, during the period from July to October, 1953 ap-

pellee entered into a contract to sell to a third party a substantial amount of the logs required to be delivered to appellants under the contract. (Claimant's Exhibit A for identification, see Appendix "A" hereof.) Appellee admitted that it had entered into a contract with Western Studs to deliver 70,000 feet of logs a day (T.R. pp. 365-366):

> "Q. Did you have contracts with anybody else to sell them logs during this period of time?
>
> A. You brought that up in the deposition. I looked in my records, and *we did have.* (Italics ours.)
>
> Q. As a matter of fact, in September, 1953, you entered into a contract with Western Studs to deliver them 70,000 feet of logs a day, did you not?
>
> A. No, I don't think so. We have the contract here; let's refresh our memory.
>
> Q. You do have the contract here?
>
> A. I think we do.
>
> Mr. Hilger. We did have it. I am trying to find it for counsel.
>
> The Referee. Take a ten-minute recess.
>
> (Recess)
>
> Q. (By Mr. Goodwin). Mr. Vander Jack, counsel has handed me a document entitled 'Memorandum Agreement Between Snow Camp Logging Company and Western Studs'. When was this agreement made, sir?"

After appellee admitted the execution of the contract and produced an undated agreement, appellants tried to establish the date of the contract and to offer

the contract in evidence over objection (T.R. p. 366) the referee refused to permit the introduction of the contract (T.R. p. 379) and any testimony concerning it. The portion of the transcript (including the contract itself) relating to the offers of proof have been printed in full and may be found in Appendix "A" hereof.

Appellants testified that they informed the bankrupt early in September, 1953 that they were in full production and that appellee should refrain from delivering gang logs to anyone else and advised appellee that to continue would be a material breach of the contract which would entitle it to rescind. (Appellants' Exhibit No. 4, T.R. p. 530, See Appendix "B" hereof.)

Alderson v. Housten, 154 C 1, 96 P. 884;

Jeppi v. Brockman Holding Co., 34 C. 2d, 11; 206 P. 2d, 847;

12 Cal. Jur. 2d, 471;

Johnson v. Goldberg, 130 Cal. App. 2d 571; 279 P 2d, 131.

Notwithstanding the fact that a foundation had been established to prove that the bankrupt had committed an anticipatory breach which would excuse further performance by appellants the referee refused appellants' offer of proof so that evidence could be adduced to establish this fact. In view of the referee's subsequent findings (T.R. pp. 50-52, Findings 11-18, inc.) that the contract was breached by appellants, the

failure to permit proof of the anticipatory breach was prejudicial error.

IV. b. THERE WAS ALSO AN ACTUAL BREACH BY THE BANKRUPT.

In addition to the error committed by the Referee in refusing appellants' offer of proof as argued above, the Referee erred in misinterpreting the provisions of the contract itself. Paragraph 8 of the contract (T.R. p. 8) reads as follows:

> "8. Sellers shall have the right to sell logs of any type to other buyers of logs *until* buyer comes into full production upon that type of log. In the event buyer ceases production upon any type of log, or cuts back on production, sellers shall have the right to sell any of such logs as buyer does not require upon the open market and to other buyers." (Italics ours.)

Appellants' mill came into full production sometime around the middle of May, 1952 and there is no dispute that it was in full operation at least until September, 1953. There is some conflict in the evidence as to whether or not it continued in full operation during October, 1953 (T.R. pp. 364-365) when the delivery of the logs ceased. According to the provisions of paragraph 8, above, bankrupt had no right to sell gang logs to anyone else, and having admittedly done so, thereby breached the contract with appellants.

It must be kept in mind that this contract was to run for a period of ten years and appellants were to

be supplied from the Redwood Creek Ranch area which had a limited supply of logs. Appellants were only required to take the gang logs required for its mill production and not all the logs the bankrupt might choose to cut at any time. If this were so, bankrupt could cut the whole stand of lumber in one year and if appellants couldn't absorb it, bankrupt, under its (and the Referee's) interpretation of the contract (T.R. pp. 366-374) could sell the logs elsewhere, even if it meant that the result would render bankrupt unable to perform its obligations for delivery to appellants in the future. This was obviously not the intent of the parties nor in accordance with the language of the contract itself.

In addition to the evidence tendered by appellants in their offer of proof relating to the Western Stud agreement discussed above, Trustee's Exhibit No. 14, which consisted of 20 folders showing bankrupt's log production and sales to appellants and to others proves that bankrupt delivered gang logs to others prior to appellants' purported refusal to receive logs on October 21, 1953 and at times when appellants were admittedly in full production. This was an actual breach by the bankrupt and appellants were justified in refusing to continue under the contract. There was only approximately 250-300 million feet of lumber in bankrupt's tract (T.R. p. 383) to start with. Of this, only about 40% was suitable for appellants' operation as apparently bankrupt was selling 60% elsewhere. Thus, if bankrupt delivered to others gang logs which

were the type to be used by appellants when appellants were in full production, it would not have been in a position to comply with its contractual obligations to appellants. Hence, the sale of gang logs to others as admitted by appellee (Trustee's Exhibit No. 14), while appellants were in full production, was a breach of paragraph 8 of the agreement and it was the bankrupt and not appellants who first committed a breach of the agreement.

Not only was the contract breached by the bankrupt prior to any alleged breach thereof by appellants, but appellants' efforts to adduce evidence in support of their Proof of Claim against the bankrupt estate for $900,000.00 (T.R. pp. 3-30) were thwarted by erroneous and adverse rulings of the Referee (T.R. pp. 453-458). Here, appellants sought to introduce oral testimony as to damages sustained by them through excess costs, as a result of the failure of the bankrupt to deliver all of the gang logs as required per paragraph 8 of the contract above. The Referee's theory in sustaining these objections was that the books and records of appellants were the "best evidence". The law does not support either appellee or the Referee in his ruling in sustaining the trustee's objections to this line of testimony (T.R. p. 458). California Code of Civil Procedure, Section 1855, says in that regard:

> "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases: . . . Five—When the original consists of numerous accounts or other documents, which cannot be examined in Court without great

loss of time, and the evidence sought from them is only the general result of the whole. . . ."

"Entries in book accounts are not the best evidence, as against the testimony of those who participated in the evidence or transactions of which the entries are the record, or the testimony of third persons who witnessed the transaction."

Cal. Jur. 2d, Vol. 18, p. 666—Evidence, Section 198 citing *Maguire v. Cunningham,* 64 C. A. 536, 222 P. 838; *Vickter v. Pan Pacific Sales Corp.,* 108 C. A. 2d 601, 239 P. 2d 463.

"Hence, witnesses having knowledge of the transactions disclosed in the entries (here, the witness S. A. Peters himself) may testify to them without the necessity of introducing the books and papers themselves."

Supra, p. 667, citing: *Webb v. Serabian,* 93 C. A. 2d 642, 209 P. 2d 436; *Argue v. Monte Regio Corp.,* 115 C. A. 575, 2 P. 2d 54.

V. a. THE DISTRICT COURT ERRED IN FINDING THAT THERE WAS NO ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND APPELLANTS AS TO THE DISPUTE CONCERNING THE AMOUNT DUE THE BANKRUPT FOR LOGS DELIVERED BETWEEN JULY AND OCTOBER, 1953.

Referee's Finding No. 10:

> "That after June 1, 1951, and prior to October 21, 1953, said bankrupts delivered logs to Peters and Timber Incorporated of California, and Peters and Timber Incorporated of California did not pay therefor the Arcata market price less $4.00 per thousand board feet as provided in said writing, although said bankrupts demanded such payments; that as a direct result of refusal to pay such price, bankrupts were damaged in the sum of $19,625.91; that at no time prior to October 21, 1953, was there any good faith dispute as to price stated in the writing, Trustee's No. 1, nor manner of computation thereunder." (T.R. pp. 49-50.)

For the period between July 15, 1953 and October 21, 1953, the Bankrupt furnished Appellants timber, invoiced the same and received payment for each and every invoice. Each payment was made by check but was for a lesser amount than the invoice. Each check was marked "payment in full is hereby acknowledged for all logs for the period (date) thru (date)". In the blank spaces the appropriate dates were stated. (See Trustee's Exhibits Nos. 6-12, incl. T. R. pp. 171-176 incl.) These checks were all cashed by the Bankrupt. All during this period, there were disputes between the parties as to the quality of the logs and the price (see Trustee's Exhibit No. 5) to be paid there-

for. That there were unquestionably some verbal modifications of the June 1, 1951 contract is evidenced by Trustee's Exhibit No. 4 (T. R. p. 138, see Appendix "C"). This was a letter from the Bankrupt to Appellants discussing some of the deviations from the original contract. Attached as Appendix "D" are all of the various portions of the transcript dealing with the testimony in the record relating to the disputes as to price and quality. A study of these will show that the evidence is not disputed and that this Court is entitled to make its own inferences therefrom.

Costello v. Fazio, supra;
In re Morasco, supra;
Sheldon v. Waters, supra.

The Referee's said Finding No. 10 was not based on conflicting testimony but was, in effect, a factual conclusion arrived at on undisputed testimony. This finding is wholly unsupported.

It is interesting to note that, *after* receiving payment from Appellants of the *lesser* amount only, one of the invoices, for the disputed period (July 15-31, 1953) sent by Bankrupt to Appellants (Trustee's Exhibit No. 7, T. R. p. 173) contained a statement of a "balance due" of $3,984.49 (being the difference between the price charged by Bankrupt and the amount paid by Appellants). None of the later invoices carried forward any such balance. (Trustee's Exhibits Nos. 6-12, incl., T.R. pp. 171-176.) It seems quite clear that there was here, under the law, an executed accord and satisfaction.

Williston on Contracts, Revised Edition, Vol. 6, Sec. 1856, p. 5220, has this to say on the subject matter:

> "The great weight of authority undoubtedly supports the rule that where a claim is disputed or unliquidated and a tender of a check or draft in settlement thereof is of such character as to give the creditor notice that it must be accepted 'in full discharge of his claim' or not at all, the retention and use of such check or draft constitutes an accord and satisfaction (1 C. J. S., Accord and Satisfaction, Sec. 34, p. 528) and it is immaterial that he advises that he protests against the acknowledgment of full payment (1 Am. Jur., Sec. 26, p. 228), for in such case the law permits but two alternatives, either reject or accept in accordance with the conditions. To the same effect, *Lapp-Gifford Co. v. Muscoy Water Co.,* 166 Cal. 25, 27; 134 Pac. 989, and a host of other cases."

It is submitted that Referee's Finding No. 10 is supported neither by the disputed facts nor by the law.

V. b. THE DISTRICT COURT ERRED IN THE COMPUTATION, AS WELL AS IN THE ASSESSMENT OF, THE AMOUNT OF THE DAMAGES AWARDED TO APPELLEE AGAINST APPELLANTS IN THE JUDGMENT IN QUESTION, EVEN ASSUMING A UNILATERAL BREACH OF THE AGREEMENT OF JUNE 1, 1951 BY APPELLANTS.

The total damages awarded to Appellee by the instant judgment is $674,627.47. (T.R. p. 55.) This total was computed by the Referee as follows:

$ 19,625.91—for amount invoiced by Bankrupt and not paid (discussed in V. a. above);
30,931.57—loss of truck earnings;
146,319.00—disruption of normal operating procedures;
477,750.99—future performance

Total: $674,627.47 (T.R. pp. 50-52.)

If we assume, for the purposes of argument that Appellee was entitled to damages, the Referee arrived at most of the items thereof by the wildest speculations and the amounts allowed for these items are completely unsupported by evidence.

We can understand how the Referee arrived at the sum of $19,625.91 if his Finding No. 10 (T. R. p. 49) were correct, which we do not concede as we have heretofore argued. We can also understand the basis for the Referee's computation of damages in the sum of $30,931.57 if his Finding No. 11 (T. R. p. 50) is correct.

We here point out that there is no evidence to support this award. The party claiming damages must prove the elements necessary to support an award of damages and to prove that such damage for which he seeks compensation has occurred.

Hahn v. Wilde, 211 C. 52, 293 P. 30;
Parke v. Frank, 75 Cal. 364;
Tremorli v. Austin Trailer Equip. Co., 102 C. A. 2d 464; 227 P. 2d 923;
Kowtko v. Del & Hudson R. R. Corp., 131 F. Supp. 95;

Continental Oil Co. v. Fisher Oil Co., (10th Cir.) 55 F. 2d, 14;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., (5th Cir.) 194 F. 2d, 586.

Appellee failed to meet this burden. Disregarding any evidence to the contrary and accepting the testimony of Clarence C. Vander Jack, one of the partners of the Bankrupt (T. R. pp. 319-321) as true (the evidence upon which the award was based) we find that the witness estimated that a truck was "supposed to earn $3,000.00 per month gross"; if his trucks had earned $3,000.00 per month gross for the 66 months involved, the earnings "would" have totalled $198,-000.00. The records of the Bankrupt showed truck earnings for this period of $93,561.42 (Trustee's Exhibit No. 18). Of the resulting loss of approximately $105,000.00 (T. R. p. 321), 30% was attributable to Appellants. This is the entire basis for the award of $30,931.57, to Appellee.

It is Appellants' contention that Appellee had to do more than show that a truck should or "would" earn $3,000.00 per month gross. He had to prove that Bankrupt had earned that or that others in a comparable operation earned $3,000.00 per month gross and that if it were not for Appellants' improper handling of its dump Bankrupt would have earned this sum. The evidence is quite to the contrary. The Bankrupt earned approximately $105,000.00 less than the $3,000.00 average per month for the period involved. Of this loss only 30% was chargeable to Appellants. Consequently, according to the Bankrupt's

own books it never earned this $3,000.00 gross monthly truck average. This evidence really indicates that the 70% of the trucking done by Bankrupt was also at a loss, and there was no showing that the trucking done by Bankrupt for its other customers and/or its own account grossed an average of $3,000.00 per month, nor was it shown that the 70% operation of Bankrupt did not cause the total loss of earnings ($105,000.00).

The $198,000.00 figure was speculative, at best, and was totally unrelated and unconnected with the alleged delays caused by Appellants.

How the balance of the damages computations ($624,069.99) was made is a complete mystery and is completely unsupported by any evidence.

The next item to be considered is the award of $146,319.00 for purported disruption of normal operating procedures (Finding No. 11, T. R. p. 50). There is nothing in the record setting forth any itemization of loss for disruption of normal operating procedures excepting the loss of truck profits for which Appellee was awarded the aforementioned sum of $30,931.57.

Appellee tendered some proof on this subject (T. R. pp. 106-111), but an objection (T. R. p. 112) to this line of testimony was sustained (T. R. p. 114). Thereafter, certain evidence was received (T. R. pp. 114-117, inc.), which would constitute the hourly cost of maintaining a crew. This total also included a portion of the trucking costs for which Appellee was awarded damages in the sum of $30,931.57. Furthermore, there is nothing in the record, either oral or documentary,

to which these figures ($146,319.00) would be related. The elements of damages must be proved with reasonable certainty by the party claiming them.

Hahn v. Wilde, supra;
Parke v. Frank, supra;
Tremorli v. Austin Trailer Equipment Co., supra;
Kowtko v. Del. & Hudson R. R. Corp., supra;
Continental Oil Co. v. Fisher Oil Co., supra;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., supra.

There is no evidence in the record to support the portion of the Referee's Finding No. 11 (T. R. p. 50) awarding Trustee the sum of $146,319.00 for disruption of normal operating procedures.

The Referee, in Findings Nos. 15 and 18 (T. R. pp. 51-52) found that the price structure specified in the contract between the parties gave the Bankrupt a $2.31 per 1,000 board feet price advantage; and, projecting this figure over the balance of 91 months of the contract, and assuming the purported average monthly delivery of 2,272,732 feet (Trustee's Exhibit No. 15) awarded Appellee damages in the sum of $477,750.99 (T. R. p. 52). Not only is the evidence entirely lacking in support of this preposterous amount, but it is also based on an erroneous mathematical computation which would substantially reduce this award, if any award were justified.

The Referee took the summary of deliveries (Trustee's Exhibit No. 15) for the period January 1,

1953 through September 30, 1953 (9 months) and divided it by 8 instead of 9 to arrive at the average monthly delivery. The period from January 1, through September 30, 1953 is a full 9 months. The difference between the monthly average taken by the Referee (2,272,732 ft.) and the true average (2,020,206 ft.) is 252,526 ft. per month. Project this figure over the period of 91 months (the balance of the contract period) used by the Referee and we have a difference of 22,979,866 feet at $2.31 per thousand feet. Thus, the award given to Appellee on this item alone was mathematically excessive to the extent of $53,083.49.

Forgetting the mathematical error for the time being, it is respectfully pointed out that there is no evidence to support the award had it been correctly calculated. Again it must be pointed out that the party claiming damages must prove them with reasonable certainty and there must be proof that the damage for which Trustee seeks compensation has occurred.

Hahn v. Wilde, supra;
Parke v. Frank, supra;
Tremorli v. Austin Trailer Equipment Co., supra;
Kowtko v. Del. & Hudson R. R. Corp., supra;
Continental Oil Co. v. Fisher Oil Co., supra;
Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., supra;
Sapp v. Barenfeld, 34 C. 2d 575; 212 P. 2d, 233.

The testimony of Clarence C. Vander Jack, one of the partners of Bankrupt, was to the effect that the

maximum timber on the property owned by the Bankrupt and from which the shipments were to be made was 250-300 million feet (T. R. p. 383) at the time Bankrupt commenced to log it in 1951. When the Bankrupt ceased delivering logs to Appellants approximately 100 million feet had already been logged (T. R. p. 383). The maximum timber Bankrupt could thereafter supply to Appellants was 200 million feet, *providing all of the timber remaining was delivered to Appellants.* However, it is undisputed that Appellants only received 40% of Bankrupt's output of logs. (T. R. p. 312.) Therefore, the maximum amount of damages Appellee could recover would be $2.31 times 80 million feet (40% of the total remaining timber), or $184,800.00, *not* $477,750.99.

The Referee's computation was based upon the erroneous assumption that the Bankrupt's supply of lumber was inexhaustible and that out of 200 million feet remaining (only 40% of which, or 80 million feet, would have been delivered to Appellants) an average of 2,272,732 feet per month for the full 91 months remaining under the contract should have been delivered (a total of 206,091,612 ft.). As a result, the conclusion based on untrue and non-existing premises is mythical, unsound and unreasonable. There is no evidence in the record supporting this award even had not the mathematical calculation been incorrect as hereinabove demonstrated.

In addition to the figures above mentioned, Appellants offered to prove that the Bankrupts entered into a contract with Western Studs to deliver 70,000 feet

of logs per day, commencing October 1, 1953 (T. R. p. 379). This offer of proof was rejected (T. R. p. 383) erroneously, as we have already argued herein; but the Bankrupts had admitted the execution of this contract (T. R. p. 365). Thus, the Bankrupts admitted an agreement to deliver additional logs to others and its Trustee was compensated in the award for damages for the very logs Bankrupts was to be paid for by that third party. So, here, too, Appellee was compensated twice, just as he was in the computation of the loss of truck profits which appear to be included in the award of $146,319.00 mentioned above.

It is respectfully submitted that the damages awarded in this matter were not only unproven and deeply speculative, but have been erroneously computed.

CONCLUSION.

We believe that we have successfully demonstrated that the Memorandum and Order of the District Judge made on October 30, 1958 affirming the "Order, Judgment and Decree" of the Referee in Bankruptcy dated March 25, 1958 should be, by this Court, reversed, with appropriate directions to the District Court.

Dated, San Francisco, California,
June 22, 1959.

Respectfully submitted,
ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
By CHARLES M. STARK,
Attorneys for Appellants.

(Appendices "A", "B", "C", "D" and "E" Follow.)

Appendices.

Appendix "A"

Transcript of Record Pages 379-383.

(Testimony of Clarence C. Vander Jack.)

The Referee: We have to stop somewhere. The objection is sustained.

Mr. Goodwin: If your Honor please, with all due respect, in view of the Court's ruling, I would like to make an offer of proof, if I may. The offer is to introduce in evidence a document that reads as follows (reading):

"Memorandum of Agreement

"This is a memorandum of agreement between Snow Camp Logging Company and Western Studs.

"Snow Camp Logging Company agrees to supply and Western Studs agrees to receive one (1) shift of logs per day (approximately 70,000 board feet) beginning October 1, 1953, and continuing until such time as Western Studs begins to cut their cold deck in the early part of 1954, or until July 1, 1954, whichever is earlier.

"It is agreed that the logs will be sealed by Western Studs unless there is a disagreement as to the scale, in which event they will be scaled by the Northern California Scaling & Grading Bureau and each party will bear fifty per cent (50%) of the cost thereof.

"The grade of logs to be delivered will be an average of fifteen per cent (15%) or less deductions over an average two weeks.

"It is agreed that as long as Western Studs is operating and producing lumber and Snow Camp Logging Company is operating and producing logs, that this agreement will be effective and of first consideration of either party.

"In the event that either party discontinues operation as a result of market or weather conditions, the provisions of this agreement shall be suspended for so long as the operations of either or both parties is suspended.

"The price to be paid for the logs f.o.b. pond of Western Studs in Arcata, will be a price in relation to the market price of 10/15% No. 3 Btr studs as in the attached addenda.

"The market price of studs shall be determined by the price quoted for 10/15% No. 3 & Btr studs in the 'Random Lengths' as published weekly by Lumbermen's Buying Service in Eugene, Oregon, or by mutual agreement.

"Dated:

"Western Studs,
"By F. H. Baker.
"Snow Camp Logging Company,
By Clarence C. Vander Jack, Ptr."

And attached to the document is an addenda.

Mr. Hilger: We will stipulate the reporter can copy that without reading it.

Mr. Goodwin: Fine.

(The addenda to the above agreement, in words and figures, is as follows, to-wit:

"Market Price 10/15% No. 3 & Btr Studs F.O.B. cars	Price of 15% or less Deduction logs F.O.B. Pond of Western Studs, Arcata
$ 40.00	$25.00
41.00	25.50
42.00	26.00
43.00	26.50
44.00	27.00
45.00	27.50
46.00	28.00
47.00	28.50
48.00	29.00
49.00	29.50
50.00	30.00
51.00	31.00
52.00	32.00
53.00	33.00
54.00	34.00
55.00	35.00
56.00	36.00
57.00	37.00
58.00	38.00
59.00	39.00
60.00	40.00
61.00	40.50
62.00	41.00
63.00	41.50
64.00	42.00
65.00	42.50
66.00	43.00
67.00	43.50

"Market Price 10/15% No. 3 & Btr Studs F.O.B. cars	Price of 15% or less Deduction logs F.O.B. Pond of Western Studs, Arcata
68.00	44.00
69.00	44.50
70.00	45.00
71.00	45.50
72.00	46.00
73.00	46.50

C. C. V. J.,
F. H. B.)"

Mr. Goodwin: We make an offer to prove such an agreement was executed by Snow Camp Logging Company in about the fall of 1953.

The Referee: Very well. The offer will be denied, and I will mark this as Claimant's A for identification.

(The Memorandum of Agreement and Addenda referred to was marked Claimant's Exhibit A for identification.)

Mr. Goodwin: Along the same line, your Honor, I would like to further offer to prove—that is, to prove by the testimony of this witness, Mr. Vander Jack—that between the period from October 1, 1953, to July 1, 1954, Mr. Vander Jack, or Snow Camp Logging Company, did deliver, from the timber that is involved in this matter, to Western Studs, near Arcata, California, at least 70,000 feet a day of logs.

The Referee: The offer will be denied. You have it in the record.

Mr. Goodwin: Thank you, your Honor.

Appendix "B"

Timber Incorporated of California
Manufacturers
West Coast Forest Products
P. O. Box 307, Arcata, California

September 12, 1953

Snow Camp Logging Co.
P. O. Box 607
Arcata, California

Gentlemen:

You are hereby notified that the undersigned, Timber Incorporated of California, is and has been for a period of some time in full production with reference to gang logs. Therefore, in accordance with Section 8 of our Agreement, dated June 1, 1951, you are hereby notified to discontinue the selling of gang logs to any person, firm or corporation other than the undersigned.

We herewith demand that you discontinue this practice immediately and wish to advise you that in the event you fail, neglect or refuse to comply with this demand and with the said Section 8 of our said Agreement, we will regard such action on your part as a willful, substantial and material breach of our said contract, and will assert that such action will immediately give us the right of rescission of said contract, together with other rights and remedies prescribed by said contract and afforded us by law.

We further wish to advise you that in such event we will assert fully all of our said rights.

Very truly yours,
Timber Incorporated of California
By /s/ S. A. Peters, Jr.,
President

Endorsed: Claimant's No. 4, 1-21/57, BJW,
R

Appendix "C"

P.O. Box 607
August 10, 1953

Timber Inc.
P. O. Box 307
Arcata, California

Attention Mr. Peters

Dear Mr. Peters:

Your letter of August 10, 1953 has been received and read.

Regarding our conversation of July 13, 1953, I'm sure you will recall that we talked in regard to logs that were to be cold-decked and not logs delivered to your pond. We agreed that, when you started to coldeck all logs going into the deck would be paid for at the $36.00 M rate. I did not agree nor was it my intention to agree to the $36.00 M rate for any logs being currently out or out during the coldecking operation. Furthermore, you agreed that during the cutting of logs from the deck should the price of lumber rise to a point to be agreed upon jointly, we would be reimbursed to the extent of the $2.00 drop in price allowed you for coldecking.

Again on July 31, 1953 you asked that we drop the price to $35.00 if you coldecked and I agreed to do so, and you agreed again to reimburse to the extent of present market value of the logs coldecked. We did not discuss a $35.00 price for logs being currently milled nor would I have agreed to it had the subject

been mentioned. Here, as before our conversation and agreement covered only coldecked logs.

You will also recall that the price was based upon a total of 6,000,000 feet which you agreed to deck. Thus far you have not coldecked any logs whatsoever and yet have underpaid us on 1,475,320 feet to the extent of $3,730.92. We ask that this deficit be made-up promptly.

You also owe us $253.57 representing clerical expenses of this office and that of the Humboldt Bay Scaling Bureau. This to we should like to receive.

Regarding the logs of 34″ or over which you say we dumped 200,000 feet of in July, we would be very happy to take them back at the price you paid us, if they are troublesome to you.

I shall be only too happy to discuss this with you personally, if you will call me.

Very truly yours,
Snow Camp Logging Company
By.....
C. C. VanderJack

Endorsed: Trustee's "A" for identification 11-7-56 BJW R
Trustee's No. 4 11-7-56 BJW

Appendix "D"

Transcript of Record, Pages 129-145:

Q. Now, then, beginning with July or August of 1953, you began the practice of recomputing the invoices sent to you by Snow Camp Logging Company for these logs, did you not?

A. That is right. Maybe that is the letter you refer to.

Q. I will let you know when I refer to a letter. (Testimony of S.A. Peters)

Do you recall how much you revised or corrected the invoice?

A. I think it was $2, back to $34.

Q. $2 per thousand feet?

A. $2, yes.

Q. Thereafter and in August, you made further adjustments to the invoices that were sent you by Snow Camp Logging Company, did you not?

A. That is right.

Q. Do you recall what those further reductions were?

A. They were all $2, I believe.

Q. What was the condition of the market for logs from July 1, 1953, compared to September of 1953? Do you recall?

Mr. Stark. Just a minute. Will you read that question?

(Question read by the reporter.)

Mr. Stark. Objected to on the ground that it calls for the conclusion of the witness. No foundation has been laid that he knows anything about the market for logs.

Mr. Hilger. I will apologize, counsel.

Q. Did you know anything about the market price of logs in the area at that time?

A. Yes, I did.

Q. All right. Would you then tell me from your knowledge what the market for logs was in July of 1953?

A. I cannot tell you offhand approximately what it was now. Probably around $36 to $38 for No. 2 saw logs.

Q. Then, for the same type logs in September and October, 1953, what would the price be?

A. Read that again, please.

(Question read by the reporter.)

Mr. Stark. That is for No. 2 logs, counsel?

The Witness. For No. 2 logs?

Q. (By Mr. Hilger): The same type of logs that you were quoting the price on a minute ago.

A. About $34, $32 to $34 for No. 2s.

Q. In other words, in your opinion it was $6 lower in October than it was in July? I believe you stated about $38 in July.

A. The logs did drop off. The market went down. The lumber market went down, the price of logs went down.

Q. All right. You stated that you adjusted these invoices sent to you by Snow Camp Logging Company at the rate of $2 per thousand downward in each case from their price?

A. I don't recall whether he billed us at $38 or billed us at $36. Whatever I took off was agreed upon between Mr. Vander Jack and myself at the time.

That is the reason I wrote the letter confirming it to him.

Q. That was in writing?

A. Yes, I wrote him two or three letters.

Q. Did he write you any letters agreeing to it?

A. I don't recall whether he did or not, but he agreed to it.

Q. I am asking you if there was any statement in writing from Mr. Vander Jack or any one in his organization concerning these prices?

A. That, I cannot say. I don't know whether he write me a letter or not. I doubt very much that he did.

Q. I am going to show you a letter, a copy of a letter rather, from Snow Camp Logging Company addressed to Timber, Inc., attention Mr. Peters, dated August 10, 1953, and ask you if you did not receive the original of that?

A. Yes, I received the original of that letter.

Q. Is this the letter that you relied upon to establish the agreement as you have said for the reduction in log price?

A. No, we established that verbally.

Q. Then, it was not in writing?

A. I confirmed it in writing.

Q. There was no agreement in writing, however?

A. No.

Q. Subsequent to the initial adjustment that was made on the Snow Camp Logging Company's invoices, you made adjustments on others, or subsequent invoices after the first ones. Is that correct?

A. After when?

Q. I believe you stated that the first invoice of Snow Camp Logging Company on which you made an adjustment was for logs delivered from July 16 to July 31. Now, were invoices received from Snow Camp Logging Company for logs delivered subsequent to that date?

A. That is right.

Q. That is 1953. Did you make adjustments to those?

A. I did.

Q. Do you recall at what rate the adjustment was made?

A. It was reduced to $34. That was the price we agreed upon.

Q. Who agreed upon?

A. Mr. Vander Jack and myself.

Q. How, in writing?

A. No, verbally.

Q. All of the reductions were to $34 from beginning to end?

A. No, just that period.

Q. Well, July 15 to October?

A. That is right.

Q. Why did you make this reduction?

A. We agreed upon it.

Q. Who agreed upon it?

A. Mr. Vander Jack and myself.

Q. In writing?

A. No, I told you not. It was verbal.

Q. And you received this letter dated August 10?

A. I received that, yes.

Q. You received it on or about the time it bears date, when this transaction was moving forward?

A. I presume I did.

Mr. Stark. What is the date of the letter?

Mr. Hilger: August 10. Do you have the original in your file?

Mr. Goodwin. I don't know, Mr. Hilger. I will look and see.

Q. (By Mr. Hilger). I will show you, Mr. Peters, a recap, referring only to the items above "Miscellaneous" here, leaving this out for the moment. Below "Miscellaneous" would that recap be an accurate tabulation of the logs delivered by Snow Camp Logging Company during the period July, August and September as indicated?

Mr. Stark. Just a second, Mr. Peters. Is the question confined to the footage as distinguished from price?

Q. (By Mr. Hilger). That is the footage?

A. I don't know. It could be approximately correct.

Q. It would be at least approximately correct?

A. Yes.

Q. And it was to those footages that you applied your correction?

A. That is correct.

Q. Directing your attention to the columns "Per billing" and "Amount Paid," would those two items be correct?

A. Well, I presume they are, without looking at my own records.

Q. Would you say they were correct?

A. I won't confirm it now, but I assume they are.

Q. All above the amount paid is listed under July as $36; Under August $35.

A. That is right.

Q. September is $34. I think you testified the agreement was those were all to be paid for at the rate of $34, this verbal agreement you alluded to. Is it a correct statement that you came to that verbal agreement at $34 throughout that period?

A. I was under the impression that is what it was. I could be mistaken.

Q. You don't really recall what the agreement was?

A. Yes, I do.

Q. Well, what was it?

A. Well, do you want me to refer to my letters?

Q. I just want to know if you recall. You have alluded to a verbal agreement. I want to know just what you contend that verbal agreement was, what your recollection is?

A. If this is what I paid on, this is what was agreed on.

Q. You don't recall what was agreed on?

A. That is it.

Q. What is it?

A. The price that we paid.

Q. What was your agreement?

Mr. Goodwin. Your Honor, I am going to object to the repetitious asking of the same question. It has been asked and answered several times.

The Referee. And, answered differently.

Mr. Goodwin. That is correct, Your Honor, but he has testified that his recollection was $34. But, in any event, whatever he paid, he said the amounts had been agreed upon.

The Referee. Counsel wants to know what that was.

Mr. Hilger. I want to know what the witness' independent recollection was of the agreement, if any there was.

The Referee. The objection is overruled.

A. I don't say that is what it was. That was agreed upon, the figure in here.

Q. (By Mr. Hilger). What was the agreement?

A. $36 for the last half of July; $35 for August, and $34 from then on.

Q. Now, I am going to show you a letter dated September 14, 1953, rather, a copy of a letter from Snow Camp Logging Company to S. A. Peters and ask you to read that.

A. I think we received that letter, or this letter, a copy of it.

Mr. Hilger. In order to preserve the record, I am going to ask that the letter dated August 10, to which the witness has referred, be marked at this time; and the letter dated September 14, to which the witness just referred, consisting of two pages, be marked for identification.

Mr. Stark. Which letter of August 10?

Mr. Hilger. The one the witness identified as having been received by him.

The Referee. The copy of the letter.

Mr. Stark. Is that the document, Your Honor, that in the second paragraph refers to the Red Robin Cafe?

The Referee. The second paragraph?

Mr. Stark. Yes.

The Referee. I don't see anything about that.

Mr. Hilger. That is a letter from Mr. Vander Jack to Mr. Peters.

Mr. Stark. The one I am talking about is from Mr. Peters to Snow Camp Logging Company.

The Referee. That is the other letter dated September 14. That will be Trustee's B for identification.

(Letter of August 10, 1953, Trustee's Exhibit A for Iden.)

(The letter dated September 14, 1953, was marked Trustee's Exhibit B for identification.)

Q. (By Mr. Hilger). I am going to show you a letter on the letterhead of Timber, Inc., of California.

Mr. Stark. May I see it, counsel?

Mr. Hilger. I think you had it before.

Q. Dated August 10. Did you send that letter out?

A. I did.

Q. I will show you a letter dated September 10, 1953, on the letterhead of Timber, Inc., of California.

Mr. Goodwin. May we see that, counsel?

Mr. Hilger. I am sorry. I thought you had a copy.

Mr. Stark. We have no objection to the introduction of that letter.

Q. (By Mr. Hilger). I am directing your attention to the letter of August 10, 1953, from you to Snow Camp Logging Company, not the letter which we have introduced into evidence.

Mr. Stark. I don't understand that letter being in evidence.

Mr. Hilger. The one marked for identification.

Mr. Stark. That is the one you had in your hand a minute ago, I believe, Judge.

Mr. Hilger. At this time I will offer in evidence these two exhibits, unless counsel for the other side wish to substitute the originals.

Mr. Goodwin. I don't think I have them, as I told you, Mr. Hilger.

Mr. Hilger. This witness has testified he received them.

The Referee. No objection? Trustee's Exhibit A will become Trustee's Exhibit No. 4 in evidence.

(The document heretofore marked Trustee's Exhibit A for identification was received in evidence as Trustee's Exhibit No. 4)

The Referee. Trustee's B for identification will become Trustee's 5 in evidence.

(The document heretofore marked Trustee's Exhibit B for identification was received in evidence as Trustee's Exhibit No. 5)

Mr. Stark. Is there a question pending?

Mr. Hilger. Not yet.

The Referee. Go ahead.

Q. (By Mr. Hilger). Now, looking at your letter dated August 10 to Snow Camp Logging Company, you, in that letter in the first paragraph, indicate the intention of paying $36 for deliveries during the last half of July.

A. That is what it says.

Q. You indicate in the second paragraph the intention of paying $35 for deliveries during the first of August. Is that correct?

A. Yes.

Q. Now, there is nothing in that letter about paying $34 for deliveries after the middle of August, is there?

A. No. You will find another letter.

Q. I think you testified, however, that your agreement back in July was for $36 in July, $35 in August, and $34 thereafter. Didn't you so testify?

A. Well, I don't recall just when we did start the $34, but it must have been in August.

Q. There is no reference to any agreement made to that effect in the letter dated August 10 directed to Snow Camp Logging Company, is there?

A. Well, there is another letter besides that.

Q. There is no reference in that letter, is there?

Mr. Stark. Counsel, the letter speaks for itself. The Referee can read. Why don't you offer it in evidence?

Mr. Hilger. I just asked him to read his letter and asked if there is any reference in there to the $34.

The Witness. No, there is not.

Q. (By Mr. Hilger). Now, by this letter, did you intend to set forth what your understanding of this conference was in July?

Mr. Goodwin. Objected to as calling for the opinion and conclusion of the witness.

Mr. Hilger. He can certainly testify what his intention was.

The Referee. Doesn't the letter speak for itself?

Mr. Goodwin. The letter speaks for itself.

Mr. Hilger. The letter contains certain factual information. I just want to know if it was the intention of this witness that this letter constituted his version.

The Referee. It calls for his opinion and conclusion of what the letter contains.

Mr. Stark. Your Honor can read; you can draw your own conclusion of what it says.

Mr. Hilger. I know you fellows would like me to offer this, but I am not going to.

Mr. Stark. We can introduce it.

Mr. Hilger. Are you going to?

Mr. Stark. When the time comes, we will, and we will have some shocking information for you.

Q. (By Mr. Hilger). I show you a letter dated September 10, 1953.

The Referee. Is that September 10 or 14?

Mr. Hilger. September 10, from Timber, Inc., to Snow Camp Logging Company, not the one in evidence.

The Witness. Yes, I read it.

Q. (By Mr. Hilger). Directing your attention to the third paragraph there, you allege and state in that that you are computing payment on a formula involving grading of logs.

A. That is what it calls for.

Q. There was nothing in any previous correspondence referring to that formula, was there?

A. No, there was not.

Q. Referring again to this tabulation as to footages delivered between July 16 and September 30, it

would appear there were approximately 5,136,000 feet of logs delivered in that period of time.

A. That is what the letter says.

Q. That would be approximately correct, would it not, compared to the production of your mill?

A. I would say it was.

Q. You assume it would be?

A. I assume it would be, yes.

Q. You made an adjustment of $2 per thousand or $3 per thousand on all those deliveries during that period, revising the invoices downward from those received?

A. It starts with $2, I think, and then three. Then we get down here to one and three.

Q. The difference between the Snow Camp Logging Company's billing price and the amount you paid was $12,861?

A. I don't know what the figures say.

Q. Would that be approximately correct from your own knowledge of the operation?

A. I don't know. I cannot tell without looking at my own records.

Mr. Stark. Mr. Hilger, do I understand correctly? Is it your contention on behalf of the Trustee that the reduction in price, whatever price it might be or whenever it occurred, was unauthorized, first, and was not acceptable to your predecessor in interest, Snow Camp Logging Company?

Mr. Hilger. We make the contention that it was an outright departure from the contract, unauthorized by any one.

Mr. Stark. Unacceptable to you?

Mr. Hilger. Unacceptable to us at the time, and that is our contention in introducing it.

Mr. Stark. I just want to get that firmly in my mind.

Q. (By Mr. Hilger). Now, you signed checks to Snow Camp Logging Company, covering the log payments as you had computed them, did you not?

A. That is right.

Q. Did you ever send checks to them, make payments to them, beyond your computation as you had reduced it?

A. Only what we agreed upon.

Q. To get at it again: You reduced by $2 per thousand or more the invoices for logs sent to you by Snow Camp Logging Company during the period of July and thereafter through October. Is that correct?

A. No, I think according to your own figures there was just a dollar off a couple of times. I would have to look at my own records to tell you exactly what we did.

Q. In any event, you did reduce them to some extent?

A. That is right; we did.

Q. And you sent checks in the amounts as you computed them during that period?

A. That is right.

Q. And you have never made any payments beyond those payments as you computed it?

A. That is correct.

Q. Your computations and payments were less than the invoices received from Snow Camp Logging Company during that period of time?

A. They are.

Q. Now, you have stated that the reason you reduced these prices was because of some agreement. Is that correct?

A. Right.

Q. I assume from that then, it was not because of any analysis on your part of the Arcata market?

Mr. Stark. Oh, he has testified it was pursuant to an agreement between himself and Snow Camp.

Mr. Hilger. I want a definite statement of whether he did or did not refer to the Arcata market in computing the revision.

Mr. Stark. We will let him answer without objection.

The Referee. Go ahead; answer.

The Witness. Yes, we referred to the Arcata market. You want to remember, there was gradings done then, 2s and 3s.

Q. (By Mr. Hilger). Did you make revisions pursuant to the alleged agreement or did you make them by reference to the Arcata market?

A. That was the basis on which we made it.

Q. What was?

A. The Arcata price.

Q. Then, it was not pursuant to an agreement?

A. Yes, it was. We agreed upon the amount it was going to be reduced. We were buying logs ranch run.

Mr. Stark. Would you explain that to His Honor?

A. In that kind of log, it can be any type of log. It can be a 3, it can be a 2, or better.

The Referee. Just run of the mill?

The Witness. That is right. But we were getting such terrific volumes of No. 3 and culls, we had to reduce the price.

Q. (By Mr. Hilger). What was the reason, because of the poor market, poor logs, or the agreement with Mr. Vander Jack? What was the reason?

Mr. Stark. I submit, your Honor, he said there were three reasons: the fact that he was not getting as run-of-the-mill quality of log that he was entitled to; the fact that the Arcata market was less than the $34 price; and the fact that he agreed with Snow Camp as to the reduction.

Mr. Hilger. He has testified at first that it was pursuant to some agreement that was in writing; then, he changed it now that it was verbal.

Mr. Goodwin. No, he did not.

Mr. Hilger. Then, I asked if he did it pursuant to agreement or reference to the Arcata market and he said pursuant to the Arcata market and by agreement. Then, because of the poor quality of logs being received. I think we are entitled to know if there was any definite basis or reason for his reduction or an arbitrary departure from the terms of the written contract.

The Referee. Isn't that for the Court to determine from the testimony as given, which he has given, as

Mr. Stark says, in three different ways? Whether the three different ways was the reason or not, wasn't that the method?

Mr. Stark. The three different reasons culminated in the agreement, we said.

Mr. Hilger. Under the contract, I believe the Court here is bound to determine only one method. I wish to determine whether that method existed and if not, if that was a departure and breach of the contract.

The Referee. If that is your contention here, are you being hurt any by what was said already?

Mr. Hilger. We will pass it.

Mr. Stark. There is such a thing as an oral modification of a written contract.

Transcript of Record, Pages 353-354:

Q. You also testified that before you left you were not being paid as you billed. You mean by that, don't you, that you were not being paid the amount that you billed Timber, Inc.?

A. That is what I mean.

Q. You were being punctually paid on paydays, were you not?

A. I was.

Q. You were also being paid on Mr. Montgomery's scale?

A. Correct.

Q. So the difference was simply one where you billed a certain amount per thousand and got paid a lesser amount per thousand?

A. That is right.

Q. Now, in that regard you have seen, have you not, the cancelled checks, or photostatic copies, that are in evidence covering this period of dispute between you and Mr. Peters?

A. I received all the checks, but I had to cash them along with the notation on them, because I needed the money.

Q. Those endorsements of Snow Camp on the various checks are your own?

A. Are Snow Camp's endorsement.

(Testimony of Clarence C. Vander Jack).

Q. You deposited the checks and used the proceeds, is that right?

A. We did.

Q. And the notations were on the checks, "Full Payment"?

A. They were on there, but I also sent letters covering that. We did object to them.

Q. I understand that. This was during the time the dispute was going back and forth between you and Mr. Peters as to the price?

A. That is right.

Q. By the way, that dispute as to price started when, around July or August?

A. I think it started in July. We could easily see. That has been submitted here.

Q. It went through clear until the time you quit delivering logs?

A. That is right.

Appendix "E"

TABLE OF EXHIBITS (Rule 18-2.(f))

Trustee's Exhibits

Claimant's Exhibits

No. 16,322

IN THE

United States Court of Appeals

For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,

Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

BRIEF FOR APPELLEE

MAX H. MARGOLIS,
155 Montgomery Street,
San Francisco 4, California,
FREDERICK L. HILGER,
924 Fifth Street, Eureka, California,
Attorneys for Appellee.

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No. 16,322

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Appellee.

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

The proceedings originated by the filing of a Proof of Claim (T. 3-28) by Appellants with the Referee in Bankruptcy, to which Appellee filed his Trustee's Petition For Order Disallowing Claim Under Section 57 (d) of the Bankruptcy Act And For Judgment For Affirmative Relief, (T. 31-33), and on said petition an Order To Show Cause, (T.-34) issued, fixing a day and time certain for the hearing of the matter. The referee had jurisdiction. (11 U.S.C.A., Sec. 11a (2), Sec. 66, and Sec. 93(d).) Following the hearing, findings of fact and conclusions of law, and an order

judgment and decree were made and entered by the Referee on March 25, 1958. (T. 47-56.) Appellants petitioned for review on April 2, 1958. (T. 58-65.) The District Court had jurisdiction. (11 U.S.C.A. Sec. 67(c).) It approved and confirmed the order, judgment and decree of the Referee on October 30, 1958. (T. 71-85.) Notice of appeal therefrom to this Court was filed by Appellants on November 19, 1958. (T. 85-86.) The appeal was timely. (11 U.S.C.A. Sec. 48.) Jurisdiction of this Court to review the order of the District Court is sustained by 11 U.S.C.A. Sec. 47.

STATEMENT OF THE CASE

Appellants filed with the Referee in Bankruptcy their verified proof of claim, (T. 3-28) and sought, thereby, to participate in the distribution of any assets to creditors of the estate of Snow Camp Logging Company, a copartnership. In opposition to said claim, Appellee filed a petition objecting to the allowance of the claim on the ground it was unliquidated, and unless and until liquidated it could not be allowed, and in addition, sought a judgment for affirmative relief. (T. 31-34.) Appellants objected to the jurisdiction of the Referee to hear the matter; moved to withdraw their claim, and in response to the order to show cause issued by the Referee on Appellee's petition, set up a plea in abatement urging that their claim could be liquidated in an action pending in the State Court described in the exhibits attached to the claim as filed with the Referee. (T. 35-43.) The objection to

the Referee's jurisdiction and the plea in abatement were overruled. Hearings were had before the Referee. (T. 88-546.) The matter was thereafter submitted, and the Referee gave his Notice of Decision, and directed the preparation of findings of fact and conclusions, of law which were lodged with the Referee and thereafter signed and entered together with an Order, Judgment and Decree in favor of Appellee and against Appellants. (T. 44-56.) A petition for review was timely filed. (58-65.) The matter was argued before the District Court on the Referee's certificate and report and submitted on memoranda. Thereafter the District Court approved the certificate and report, and made and entered a Memorandum and Order reaffirming and approving the Referee's order. (T. 71-85.) The appeal to this Court was timely taken. (T. 85-86.)

The issue of jurisdiction of the Referee to hear and determine the matter is of paramount importance. The authorities hereinafter set forth amply sustain such jurisdiction on the facts with which we are here concerned. The question relative to the real party in interest is amply supported by the record, the findings of the Referee and their affirmance by the District Court.

In filing their claim in the bankruptcy proceeding Appellants asserted an interest in the estate of Snow Camp Logging Company, a copartnership, and thereby sought to participate as a creditor in the distribution of the assets of said bankrupt estate. Although, upon cross-examination of Appellant S. A. Peters, the record discloses, Appellants had records and infor-

mation to support the items which comprised their unliquidated claim, none were produced (T. 153-157):

"* * * Q. Do you have with you or can you tell us the items that comprise the sum of $900,000?

Mr. Goodwin. I object to the question at this time. The claim speaks for itself and at this time this is an application for affirmative relief on behalf of the Bankrupt and is not concerned with the proof of our claim at this time.

The Referee. You have already proved your claim by the filing of it.

Mr. Goodwin. Yes, your Honor. I will renew the objection on the ground that the claim speaks for itself.

The Referee. That may all be. Let me see the claim. It says the consideration of its liability arising out of the breach of a certain contract.

Mr. Margolis. A copy of the contract is attached to it.

The Referee. Yes.

Mr. Margolis. It appears on its face to be unliquidated.

The Referee. That is true.

Mr. Stark. That does not mean it cannot be liquidated.

The Referee. That may be, but it might go to whether or not it is the alleged $900,000 as shown here. Can you just say that somebody violated a contract; therefore it was $900,000?

Mr. Stark. It would have been impossible for us, in the document, to have furnished a bill of particulars as relates to the $900,000 and we were not called on to do so until the attack on the proof was made just the other day, pursuant to the Trustee's Petition.

The Referee. You concede you would have to have a bill of particulars?

Mr. Stark. Of some sort, yes.

The Referee. I guess we can take it orally. The objection is overruled.

Mr. Stark. Now, what is the question, Mr. Margolis?

Mr. Margolis. May we have the question read?

(Question read by the reporter as follows:

'Do you have with you or can you tell us the items that comprise the sum of $900,000?')

The Witness. Is that the question?

The Referee. Yes.

A. No, I cannot at this time.

Q. (By Mr. Margolis). Can you give us any single item which is a portion of the $900,000?

A. No, I would not want to do that without going over our records to see what we did set up.

Q. Did you furnish your attorneys, Huber & Goodwin, with any information they used as the basis of the claim you executed and verified?

A. I probably did. There are auditors.

Q. Can you tell us whether you did?

A. I don't know whether they received it. Our auditors did.

The Referee. What is your objection to the claim, Mr. Margolis?

Mr. Margolis. It is unliquidated.

The Referee. Is that all; that it is unliquidated?

Mr. Margolis. Yes. We contend it is unliquidated. On the basis that it is unliquidated, we are entitled to go into the items that comprise the claim.

The Referee. But, there is a question whether they have a good claim here?

Mr. Margolis. That is it. I think we have made a prima facie showing. As is usual in cases of this kind, on the evidence already adduced, it is the burden now for the claimant to go forward and attempt to establish it, after which, I think, we would be entitled to put in evidence of our cross-claim.

Mr. Stark. You have made a prima facie showing of what?

Mr. Margolis. That the claim has not been established; that it is an unliquidated claim. Our objection to it is that.

Mr. Stark. We do not dispute that, but the claim is to be liquidated in the trial of the action in Humboldt County now set for the 26th of November.

Mr. Margolis. That has been ruled on already.

The Referee. As I remember, an oral objection to a claim is good enough, isn't it?

Mr. Stark. I believe so, but he simply objects on the ground that it is unliquidated.

The Referee. I know he says that, but if he said it does not comply with the Bankruptcy Act——

Mr. Stark. Section 57d, your Honor, says that a claim, in effect, can be liquidated in any reasonable manner.

The Referee. I know it says that.

Mr. Stark. And we are doing our best to liquidate it.

The Referee. But, you don't want to do it in the Bankruptcy Court.

Mr. Stark. No, sir.

The Referee. You are here; that is where you are going to stay, so far as I am concerned.

Mr. Stark. Well, the witness cannot state a bill of particulars.

The Referee. He would be entitled, I think, to file a bill of particulars.

Mr. Margolis. Very well.

The Referee. How long will it take you to prepare it?

The Witness. I would have to do it after I went back to Arcata, your Honor.

The Referee. How many days after you get back?

The Witness. I would say two or three days.

The Referee. I think that is where we are now. I think we can stop right here and give him time to prepare that. * * *"

Appellants filed a Bill of Particulars. (T. 43-44.) At the continued hearing, the record, (T. 166-167) discloses the following testimony:

"* * * Q. Now, do you have in your office the items which you told this Court were prepared by your accountants and turned over to Messrs. Huber and Goodwin for the purpose of filing this claim?

A. They are only estimates. That is all we could make.

* * *

Q. You tell us now that the $900,000 is just an estimate. Is that correct?

A. That is all we could do. That is correct.

* * *"

Although all the issues raised by the Appellee's counterclaim were vigorously contested, no evidence was introduced nor offered in support of Appellants' claim.

STATEMENT OF FACTS

Appellants set forth a mixture of facts and legal conclusions (AOB 10, 11, 12), under the heading "Statement of Facts". The statements therein contained are misleading in many instances, and an advocacy of contentions in most others. The statement does not comply with Rule 18(e) of this Court in that no adequate reference is made to pages of the record to permit verification. Accordingly, it is requested that such statement be disregarded in its entirety.

On June 1, 1951, Appellant Peters and bankrupt Snow Camp Logging Company entered into an agreement in writing. (T. 89-90.) The agreement provided that Snow Camp sell and Peters buy all logs required by Peters in his Redwood Creek sawmill operation for a period of 10 years at Arcata market price less $4.00 per thousand board feet. (T. 7-8.)

Immediately thereafter Peters built a gang mill on Redwood Creek but built no other type mill (T. 94), although the contract recited that a circular mill and a veneer mill were to be built by Peters. (T. 6.) Peters told Snow Camp he would complete the circular mill in 1953 (T. 96) and monthly log requirements would approximate 5 to 6 million feet (T. 95).

Thereupon, Snow Camp purchased 3 tractors at a cost of $31,000 each, lined roads to proceed to Peters' mill rather than to the highway, purchased 5 International trucks at a cost of $17,000 each, and 12 G.M.C. trucks at a cost of $20,000 each in order to meet Peters' requirements. (T. 97-98.)

Logs were delivered to Peters up to October 21, 1953 with never a complaint there were insufficient logs to supply his requirements. (T. 102.)

From May of 1953 to October 21, 1953, logs were allowed to pile up at the Peters Mill dump, making further unloading impossible for periods of 2 to 3 days' duration. (T. 103, Trustee's 2 and 3.) Trucks loaded and awaiting unloading could not be used until unloading was completed. (T. 107.) Operation and clearing of the log dump was the sole responsibility of Peters. (T. 109.)

The result of the tie-up of trucks was loss of use of the equipment and disruption and delays in the logging operations (T. 111), increasing logging and delivery costs. (T. 111.) Woods workers wages alone for each crew was $28.50 per hour. (T. 116-117.) The time lost by delays during May to October 21, 1953, represented 30% of the total time. (T. 120.) Of the total of 17,113 hours worked during the period, (T. 313, Trustee's 17), 30% amounts to 5,134 hours wasted @ 28.50 per hour (T. 116-117) for wages alone.

Delays of Snow Camp trucks resulting from dump plugging during the summer and fall of 1953 amounted to 30% of total time. (T. 120.) Actual "earnings" or value of production of trucks during that period were $93,561.42 (Trustee's 18), whereas average reasonable earnings for the trucks involved over that period were $198,000. (T. 320.) The difference in earnings of trucks was 30% attributable to delays at Peters' dump. (T. 321.) Peters men deliberately let the dump become plugged. (T. 213.)

During the period from the latter part of July through October 21, 1953, Peters paid less than the invoiced amounts for logs delivered (T. 171 et seq., Trustee's 6-12) in an amount totalling $19,625.91. Peters explained this shortage as being pursuant to some modification of the writing, the terms of which modification appear uncertain (AOB Appendix D, T. 129-145.) Snow Camp, through witness Vanderjack, stated there was no departure from the usual method of invoicing in effect during the entire contract and no dispute regarding the price computations therein. (T. 402-403.) Snow Camp protested the underpayments. (T. 177, Trustee's 13.)

Contrary to the contract requirement that he buy all his requirements from Snow Camp (T. 7), and in the face of demonstrated capacity of Snow Camp to supply his needs (T. 432), Peters purchased logs from others during August, September and October, 1953. (T. 210, T. 219, T. 253, (testimony of Peters own millwright) T. 294, T. 296.) On October 18, 1953 Peters informed Snow Camp that he would accept no more logs. (T. 295.) Snow Camp attempted deliveries for a few days but received no receipts for logs delivered (T. 295), and Peters never accounted for those deliveries. (T. 296.) Snow Camp demanded a receipt through its driver Virgil Ray, but was refused. (T. 295, T. 287-289.)

As a result, Snow Camp was required to dump all its production on the open market. (T. 297.) The market softened and bankruptcy ensued. (T. 297.)

The cost of delivering logs to open market was $10.31 per thousand, (T. 301), whereas cost of delivery

to Peters was $4.00 per thousand. Of the $6.31 price advantage to Snow Camp, $4.00 was allowed Peters in the Contract (T. 7) leaving remaining a contract advantage of $2.31 per thousand compared to open market.

During 1953, Snow Camp was delivering more than 2 million feet per month. (Trustee's 15.) Peters' production was averaging 3 million per month. (T. 251.) By mathematical computation the contract had 91 months yet to run at October 21, 1953. (T. 8, Sec. 7.)

After October 21, 1953, no further deliveries of logs were made to Peters by Snow Camp. (T. 294.) This litigation ensued.

ARGUMENT OF THE CASE

1. THE ORDER OF THE DISTRICT COURT WHICH APPROVED THE REFEREE'S ORDER OVERRULING THE OBJECTION TO THE JURISDICTION OF THE REFEREE TO HEAR AND DETERMINE THE MATTER, IS SUSTAINED BY NUMEROUS AUTHORITIES.

Where a creditor files a claim to which a bankruptcy trustee interposes a defense by way of a counterclaim exceeding the amount claimed by the creditor, and the counterclaim arises out of the same transaction or occurrence, the filing of the claim amounts to consent to the summary jurisdiction of the bankruptcy court.

Alexander v. Hillman, 1935, 296 U.S. 222, 56 S. Ct., 204, 209, 80 L. Ed. 192;

Pepper v. Litton, 1939, 308 U.S. 295, 60 S. Ct. 238, 244, 84 L. Ed. 281;

Columbia Foundry Co. v. Lochner, 1950 (4 Cir.) 179 F. (2d) 630, 634, (14 A.L.R. (2d) 1349-1358);
Florance v. Kresge, 1938, 4 Cir., 93 F. (2d) 784.

In *Alexander v. Hillman* (supra), the Court 56 S. Ct., stated at page 209:

> "Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading, or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims. * * *"

The jurisdiction to allow and disallow proofs of claim in a bankruptcy proceeding is based on Sec. 2 a(2) of the Bankruptcy Act, (11 U.S.C.A. Sec. 11 a(2)), which provides:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

The manner of liquidating claims is governed by Section 57d of the Bankruptcy Act, (11 U.S.C.A. Sec. 93d) which provides:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the Court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the Court; and such claim shall not be allowed if the Court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation could unduly delay the administration of the estate or any proceeding under this Act."

The Supreme Court of the United States has held in several cases, that the exclusive jurisdiction of the bankruptcy court to control the administration of a bankrupt estate cannot be surrendered to another court. *United States Fidelity & Guaranty Co. v. Bray,* 1912, 225 U.S. 205, 32 S. Ct. 620, 56 L. Ed. 1055; *Gross v. Irving Trust Co.,* 1933, 289 U.S. 342, 53 S. Ct. 605, 77 L. Ed. 1243, *Isaacs v. Hobbs Tie & Timber Co.,* 1931, 282 U.S. 734, 51 S. Ct. 270, 75 L. Ed. 645.

In this respect the jurisdiction of the bankruptcy court is exclusive of all other courts. It is so held in *Pepper v. Litton,* (supra), the Court stating, 60 S. Ct. 238 at 244:

> " . . . Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation

thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entry of such judgments 'as may be necessary for the enforcement of the provisions' of the act. *In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. United States Fidelity & Guaranty Company v. Bray,* 225 U.S. 205, 217, 32 S. Ct. 620, 625, 56 L. Ed. 1055 . . .

"*Hence, this Court has held that a bankruptcy Court has full power to inquire into the validity of any claims asserted against the estate and to disallow it if it is ascertained to be without lawful existence.* Lesser v. Gray, 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 471. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature, so far as provability is concerned, Boynton v. Ball, 121 U.S. 457, 7 S. Ct. 981, 30 L. Ed. 985, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. Wetmore v. Markoe, 196 U.S. 68, 25 S. Ct. 172, 49 L. Ed. 390 . . ." (Emphasis added.)

In *Florance v. Kresge,* (supra), where a trustee filed counter-claims arising out of the same contract which formed the basis of the creditor's claim, it was stated at page 786:

" . . . We see no reason why the court of bankruptcy should not pass upon the claims in favor of the bankrupt estate and set them off against the claims filed against the estate and its receivers; and under the recent decision of the Supreme

> Court in Alexander v. Hillman, 296 U.S. 222, 56 S. Ct. 204, 209, 80 L. Ed. 192, we see no reason why the court, which is a court of equity even though exercising special statutory powers, should not proceed to render judgment against Kresge for any balance found to be due by him . . ."

In *In re Mercury Engineering Co.,* 1945, D.C.S.D. Cal., 60 F.S. 786, the Court in following *Alexander v. Hillman, Pepper v. Litton,* and *Florance v. Kresge,* (supra) stated at page 787:

> " . . . My own impression is, despite some older decisions by other judges of this district, in the light of the more modern trend to identify the function of the Referee in passing on claims . . . the right to award a judgment exists . . . One who comes into a court of equity and asks that it give recognition to a claim, so that he may share in an estate before it in the proportion which his claim bears to the value of the estate, has brought before the court the determination of his entire claim. And if the Court finds that his claim is invalid, he is not in a position to say that the Court, the jurisdiction of which he invoked has no power to render judgment against him for the surplus . . . "

The foregoing holding was followed in *In re Germain,* 1956, D.C.S.D. Cal. 144 F.S. 678.

In *Inter-State National Bank of Kansas City v. Luther,* 1955, 10 Cir., 221 F. (2d) 382, where appellant bank filed a creditor's proof of claim to which the bankruptcy trustee filed objections and sought affirmative relief on a voidable preference, the bank

objected to the jurisdiction of the bankruptcy court on the grounds, (a) that the bankruptcy court could not in a summary proceeding hear and determine the matter because it made timely objection to such jurisdiction as provided in Section 2a(7) of the Bankruptcy Act, 11 U.S.C.A. Sec. 11, sub. a(7), and (b) that the claim it filed arose out of a transaction which differed from that of voidable preference claim asserted by the trustee. In overruling these defenses, and sustaining the District Court's affirmances of the bankruptcy court's order granting affirmative relief, the Court in following *Alexander v. Hillman* (supra), stated at page 390:

> "We hold, therefore, that the court acquired jurisdiction of the counterclaim by implied consent, and that it was authorized to adjudicate the preference and give judgment for recovery of the same."

Appellants ground their opposition to the bankruptcy court's jurisdiction, to hear and determine the issues here involved, on an erroneous premise. They say (AOB 13 and 14), that since the pending matter did not cover a "preference action" and "the sole basis of Appellee's counterclaim was not any preferential or fraudulent transfer . . .", the rule which allows counterclaims to be heard and determined by the bankruptcy court only governs such situations, and is not applicable to the instant matter. We challenge the accuracy of that statement.

Columbia Foundry Co. v. Lochner, (supra), relates to a situation in which a creditor filed a claim for a

balance, on an open book account, for iron castings furnished the bankrupt, and a counterclaim for damages, asserted by the trustee, because the imperfect castings resulted in a loss of business and the ensuing bankruptcy.

In *Florance v. Kresge* (supra), the creditor's claim was for unremitted rent collected by the bankrupt from tenants of the creditor, and the counterclaim asserted by the trustee was on a contract under which the bankrupt was entitled to a percentage of the profits arising out of a sublease procured by the bankrupt for the creditor.

The reading of the authorities cited by Appellants on this point reveals they are readily distinguishable both on the facts and the law and several because of their antiquity, for example:

In re Continental Producing Co., 1919, D.C. Cal. 261 F. 627, and *In re Bowers,* 1940, 33 F.S. 965, held that a bankruptcy court could not enter a judgment on a counterclaim for any excess, and the former also held that it was mandatory for the trustee to waive the excess before the Referee could undertake hearing the matter on the merits. *In re Florsheim,* 1938, D.C. Cal., 24 F.S. 991, is to the same effect. Obviously this is not the law today. The earlier cases were decided before the United States Supreme Court decision in *Alexander v. Hillman,* (supra) the later did not consider the rule therein announced.

Fitch v. Richardson, 1906, 1 Cir., 147 F. 197; *Metz v. Knobel,* 2 Cir., 1927, 21 F. (2d) 317; *In re Conti-*

nental Producing Co., In re Bowers, and *In re Florsheim* (supra), were considered in *Columbia Foundry Co. v. Lochner,* (supra) wherein the 4th Circuit pointed out that they were decided before the decision of the Supreme Court in *Alexander v. Hillman,* (supra), and in most of the subsequent cases no mention of that decision is made.

Harrison v. (Cumberland, sic) *Chamberlin,* 1926, 46 S. Ct. 467, 271 U.S. 191, 70 L. Ed. 897, is inapplicable. Here the trustees sought to bring in a stranger to the proceedings to recover property held adversely to the trustee, under a claim of right which was not merely colorable. There is no question but that the holding is correct. It does not, however, cover a factual situation with which we are here concerned.

Cline v. Kaplan, 1944, 65 S. Ct. 155, 323 U.S. 97, 89 L. Ed. 558, is inapplicable. A trustee by a petition for a turn over order sought to recover property from a stranger to the bankruptcy proceedings. The respondents' answer claimed ownership in themselves and prayed dismissal of the petition. After extensive hearings to determine whether the property was in the constructive possession of the bankruptcy court, respondents then moved for a dismissal for want of summary jurisdiction. The motion was granted. The rule in this case which stands for the proposition that objection to the summary jurisdiction of the bankruptcy court could be made even after trial and before submission has been abrogated by the 1952 amendment to Section 2a (7) of the Bankruptcy Act, (11 U.S.C.A. Sec. 11a(7)), which now requires a party adverse

to the trustee, to interpose objection to the summary jurisdiction of the bankruptcy court by answer or motion within the time prescribed by law or rule of court.

B. F. Avery & Sons Co. v. Davis, 1951, 5 Cir., 192 F. (2d) 255, is distinguishable on the facts and the law. There the Trustee asserted several claims which were not related to the proof of claim filed by the creditor which covered the balance of an open account. The Trustee sought the recovery of a promissory note drawn in bankrupt's favor by one of his debtors which a representative of Avery Company picked up together with a neon sign prior to the intervention of bankruptcy. Avery Company contested the summary jurisdiction of the bankruptcy court on the ground that those items of personal property were acquired before bankruptcy and were held by it under an adverse claim of right, asserted in good faith which assertion was not merely colorable. We have no quarrel with the holding in this case, because the claim of the trustee for the recovery of the personal property bore no relation to, nor did it arise out of the same transaction, as the claim on the open book account filed by the creditor. Appellants' contention that the rule announced in that case should be followed by this court, (AOB 14), is founded upon a misapplication of the facts therein and those in this pending matter. The rule that a bankruptcy court does not have jurisdiction to hear and determine, in a summary proceeding, title to property, not in its actual or constructive possession, is not involved in this case, as it was in the *Avery*

case. Accordingly, it is our contention that the rule of the Fifth Circuit is not applicable.

In re Tommie's Dine & Dance, 1952, D.C. Tex., 102 F.S. 627, is distinguishable on its facts and hence is not applicable here. On page 628, it is stated:

> " . . . The Columbia Foundry Co. v. Lochner decision grew out of the same transaction, which is not true in the case at bar . . ."

In re Houston Seed Co., 1954, D.C. Ala., 122 F.S. 340, appears to follow the long discarded rule announced in *In re Continental Producing Co.,* and *In re Bowers,* (supra) at page 343 the Court stated:

> "The referee did not err in disallowing the trustee's counterclaims for any sums beyond the amounts set out in the proofs of claims . . ."

This rule would require a trustee to split his claims. It is not followed by the District Courts in this Circuit. See *In re Nathan,* 1951, D.C. Cal., 98 F.S. 686, 26 So. Cal. L. Rev. 167, which is approved in *Danning v. United States,* 1958, 9 Cir., 259 F. (2d) 305.

Duda v. Sterling Mfg. Co., 1949, 8 Cir., 178 F. (2d) 428, is likewise distinguishable on its facts. The trustee in a reorganization proceeding, by a petition alleging several causes of action and an order to show cause issued thereon sought to bring Duda into the bankruptcy court, in order to recover on his alleged claims. Duda objected to the summary jurisdiction at once, and filed an answer claiming certain setoffs. *The important distinction is that he did not file a creditor's claim in the first instance.*

2. THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE REFEREE'S ORDER HOLDING THAT COMITY DID NOT EXIST UNDER THE FACTS AND CIRCUMSTANCES OF THIS MATTER, AND THAT JURISDICTION OF THE BANKRUPTCY COURT WAS SUPERIOR TO THAT OF THE STATE COURT.

Even in a non-bankruptcy matter where the question of comity was raised "that there is pending an action in the superior court of Los Angeles County, California, this Court in *Hudson v. McWilliams,* 1927, 9 Cir., 17 F. (2d) 733, stated at page 734:

> "The prior suit, the pendency of which is relied upon as divesting jurisdiction in the present case, is pending on appeal to the Supreme Court of California . . . But the pendency of that suit was clearly no obstacle to the jurisdiction of the court below to maintain the present suit, and to protect in the meantime the alleged interests of appellees."

Furthermore, the Courts of California, in considering this same question in a bankruptcy matter, have agreed that it is proper for the Federal Courts, under the Bankruptcy Act, to proceed with the administration of the affairs, property and claims involving the bankrupt, to the exclusion of the State Court even though the initiation of a State Court action preceded the intervention of bankruptcy. *Manter v. Howard,* 1949, 94 C.A. (2d) 404.

It is true that in certain matters which may arise in the administration of a bankruptcy estate, even such as the instant case, the bankruptcy court *might in the exercise of its discretion,* conclude that it is desirable to have a state court try a certain issue when it

feels that the state court is in a better position to determine the same expeditiously. Here the referee denied Appellants' opposition to his jurisdiction to hear and determine the matter. The question presented then, is that in so doing, did the referee sitting as the bankruptcy court, abuse his discretionary powers? We think not.

This Court in *Heider v. McAllister,* 1958, 9 Cir., 265 F. (2d) 486, affirmed an order of the District Court which had affirmed a bankruptcy referee's order denying a motion to dismiss the trustee's objections to a claim "on the ground that the Bankruptcy Court is without jurisdiction to entertain these objections because the same matter has been submitted to the" state court. The Court followed the holding in *Pepper v. Litton,* (supra), and stated at page 488:

> "The motion was denied on the ground that the Bankruptcy Court could not relinquish paramount jurisdiction to determine the validity and amount of a claim to property in the possession of that court. It was also held that the 'action in the state court is for the recovery of corporate funds and only indirectly involves the question of the validity of the Heider mortgage.' Upon a hearing on the merits, the claim of Heider was held without validity. The District Court affirmed upon review. Appeal to this Court followed.
>
> "The Bankruptcy Court has plenary and paramount authority to determine the validity of asserted liens upon property of the bankrupt in its possession at the date of the filing of the petition for adjudication. Here the question of validity of the Heider claim of lien was expressly reserved

at the time of the creation of the fund still in the possession of the Bankruptcy Court. The Referee has held the alleged lien invalid. No question is raised upon the merits. Under the circumstances, this Court holds the Bankruptcy Court was in exercise of jurisdiction committed to that tribunal."

"It is argued that the Referee could not act without first expressly cancelling and withdrawing the permission to maintain suit in the state court. In the face of the express reservation, the question as to the validity of the alleged lien was never submitted to the state court. Heider attempted to bring this cause of suit into that proceeding by counterclaim and was met by plea in abatement. The Referee held that the issues submitted to the state court involved the Heider mortgage only indirectly. Unquestionably, if there had been a decision upon these issues, the Heider claim in bankruptcy might have been affected. However, that is of no consequence since the state court has never decided any question upon the merits.

"No discussion is necessary of the problem which would have been presented if the state court had actually entered a judgment in which it determined facts affecting the Heider Claim. Questions of *res judicata* or collateral estoppel by judgment might be raised. The effect of the consent of the Referee to adjudication might, under such circumstances, be of weight. There has been no adjudication by the state court."

"Another matter is debated. It is contended that, if the Referee has once consented to suit by a trustee in the state court, the mandate is irrev-

> ocable. This Court is of the opinion that such an action could be dismissed without prejudice upon order of the Referee or that the Referee might withdraw consent to further maintenance of the action at any time before trial . . ."

In seriously urging the defense of comity, Appellants have conceded that the real parties in interest in the state court action, and the controversy, are the same as in the proceeding herein—a position inconsistent with the Appellants' contention that the bankrupt is not the real party in interest in this proceeding.

The question of comity between a state court and a bankruptcy court was ruled upon in *Englebrecht v. Wildman,* 9 Cir., No. 16182, ...F. (2d) ..... In this case an action, to dissovle a partnership and for an accounting, was brought in a state court, and while it was pending, one of the partners, and his wife, filed their voluntary petitions in bankruptcy. The appellants before this Court objected to the jurisdiction of the bankruptcy court to hear and determine the matters relating to items of property which were the subject matter of the state court action and which belonged to a predecessor partnership, in which the bankrupt was a member. On the basis of these facts, this Court after questioning the assertion by appellant that this was an in rem action, and assuming it to be such, stated:

> "The state court action, to the extent it may have attempted to deal in rem with the property, abated upon the filing of the petition."

It is apparent, therefore, that the Federal Courts, applying the provisions of the Bankruptcy Act, have authority to hear and determine matters affecting a bankrupt's property and liabilities, whether the issues to be determined are in rem or in personam notwithstanding a prior state court action. This contention is supported in *Toucey v. New York Life Insurance Company,* 1941, 314 U.S. 118, 86 L. Ed. 100, 62 S. Ct. 139, where the United State Supreme Court points out, at page 143, that in Bankruptcy proceedings, comity does not prevail.

Appellants argue they were deprived of a jury trial. (AOB 16.) They fail to point out to this Court that they vigorously and successfully resisted having the cause heard before a jury in the State Court. Appellants would leave the impression that a definite date for trial in the State Court was set, for a day certain, preceding the hearing on the order to show cause herein, but fail to reveal that such date had been vacated prior to the hearing of the order to show cause herein, because of the Judge's serious illness, hospitalization and subsequent death. This is reflected by the record. (T. 538-540.)

> "Mr. Hilger. By way of a statement to the Court, in as much as the record, or a portion thereof, at least, of the action in the State court has been introduced by the Claimant, I would like to complete that matter by observing to the Court that the Claimant in the matter, or in this matter, and the Defendant in the State court action, moved the State Court to have the matter tried without a jury, after the matter was set as a jury

case in October, and upon such motion the State Court set the matter as a non-jury case, and that was upon the motion of the Defendant there, the Claimant here.

Isn't that correct, Mr. Goodwin?

Mr. Goodwin. It was originally set as a jury trial at your request, and after a jury had been waived and we objected to the jury——

Mr. Hilger. That is correct, you objected to a jury, and the result of that objection was that it was changed to a non-jury setting.

Mr. Goodwin. That is my recollection.

Mr. Hilger. And the judge before whom this matter was (454) set was unable to try the same because he was taken to the hospital for surgery. And then it was re-set for a later trial, at which time the Trustee filed his objection and initiated this proceeding. The judge before whom this matter was set since died.

Mr. Stark. It is true, however, that the trial in the State court was set for trial on a date certain, which preceded the date this hearing came on for hearing.

Mr. Hilger. It had at one time been so set, but was unable to be tried because of the fact that the judge went to the hospital on that date.

Mr. Goodwin. That is true. And on one occasion it was reset for another date, and we were restrained, as I remember, from proceeding with the action.

Mr. Hilger. That is correct. But the second setting was subsequent to the initiation of this proceeding; the first setting was prior, the second setting was subsequent.

Mr. Goodwin. I think it was set the second time prior to this. I am sure it was.

Mr. Stark. What happened was this ——

Mr. Hilger. It was set, but the time set would have occurred subsequent to the initiation of this proceeding.

Mr. Stark. That is right. Here is what happened: You started the hearing on your objections and sought a continuance. That would have carried you by the date the matter was set for the State court. (455)

Mr. Hilger. We did not seek a continuance. The continuance was granted on the Court's own motion.

Mr. Stark. Let's not quibble about words. The continuance occurred. At the time the continuance was indicated you asked the Court to restrain the parties in the State court action.

Mr. Hilger. That is correct.

Mr. Goodwin. That is correct."

Under the circumstances of this matter, appellants' contention that they were entitled to a jury trial is without merit. In a similar factual situation, where, upon the filing of a proof of claim, a trustee sought affirmative relief on a counterclaim for the recovery of a voidable preference, and the question of the right of the creditor to a jury trial, the Court in *Inter-State National Bank of Kansas City v. Luther* (supra), stated at page 390:

> "To the contention that the Bank was denied the right to a jury trial, it need only be said that if, as we have held, the Bank impliedly consented to the summary jurisdiction of the court, it thereby pro tanto waived its right to a jury trial on the issues involved in the claim and counterclaim, including the preference issue."

The authorities urged by Appellants on this point are distinguishable as hereinafter set forth.

In *Murphy v. Bankers Commercial Corp.,* 1953, 2 Cir., 203 F. (2d) 645, a direct appeal was taken to the Circuit Court from an order made by the District Court, in a plenary action to foreclose a mortgage, denying an injunction pendente lite to stay a similar pending action in a foreign country. This case merely holds that the District Court did not abuse its discretion in denying the injunction. In *Brehme v. Watson,* 1933, 9 Cir., 67 F. (2d) 359, a review to the District Court was taken from a restraining order issued by the bankruptcy court, upon application of a petitioning creditor in an involuntary proceeding, which attempted to restrain the alleged bankrupt from proceeding with the defense of two actions brought by that creditor, and in which action that creditor caused attachments to be levied. This Court in reversing the bankruptcy court, and dissolving the restraining order held (page 362) that:

> "Appellee's effort through the medium of suits brought by him, to precipitate appellant into bankruptcy and thereafter by restraining order prevent him from presenting his defenses to these suits was an unfair and oppressive use of legal process which should not be permitted. 32 C.J. p. 86."

The rule announced by the foregoing authorities is that such an injunction, issued by a bankruptcy court, may be directly appealed. No review was taken by Appellants in the instant matter within the time required by law, and was raised for the first time when

the entire matter was brought up to the District Court. Those authorities, therefore, appear to be inapplicable.

Prefacing the colloquy, AOB 18, which led up to the granting of the restraining order, the Referee had theretofore informed Appellants that the issues would be tried before the bankruptcy court. (T. 156-157.)

> "Mr. Stark. Section 57 your Honor, says that a claim, in effect, can be liquidated in any reasonable manner.
>
> The Referee. I know it says that.
>
> Mr. Stark. And we are doing our best to liquidate it.
>
> The Referee. But, you don't want to do it in the Bankruptcy Court.
>
> Mr. Stark. No sir.
>
> The Referee. You are here and that is where you are going to stay, so far as I am concerned. . . ."

The foregoing colloquy, added to the portion quoted, AOB 18-19, amply demonstrates that the granting of the restraining order was not made ex parte. True, it was not made on notice, but the trial was already in progress. (T. 88-161.) The order was directly appealable and no appeal having been taken, it was final and conclusive upon Appellants.

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3. THE UNITED STATES DISTRICT COURT DID NOT ERR IN AFFIRMING THE REFEREE'S RULING, REFUSING TO PERMIT THE WITHDRAWAL OF APPELLANTS' CLAIM.

This precise question of the withdrawal of a claim filed in a bankruptcy proceeding and against which a

trustee filed a counterclaim for the recovery of a voidable preference, was decided in *In re Nathan,* 1951, D.C. Cal., 98 F.S. 686; 26 *So. Cal. L. Rev.* 167. In overruling the referee's order permitting the withdrawal of the claim in that case, the District Court stated at page 692:

> "In addition to the considerations of reason just discussed there are patent considerations of policy which also support extension of the rule of Alexander v. Hillman, supra, 296 U.S. 222, 56 S. Ct. 204, 80 L. Ed. 192, to bankruptcy proceedings.
>
> "The general policy of the Bankruptcy Act to effect 'quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay,' Bailey v. Glover, 1874, 21 Wall. 342, 88 U.S. 342, 346, 22 L. Ed. 636, is supplemented by the provisions of Sec. 68, sub. a, 11 U.S.C.A. Sec. 108, sub. a, which in effect declare a statutory policy to settle all permissible claims or accounts 'between the estate of a bankrupt and a creditor'. See Cumberland Glass Mfg. Co. v. De Witt, 1915, 237 U.S. 447, 454-457, 35 S. Ct. 636, 59 L. Ed. 1042."
>
> "The provisions of Rule 41 of the Federal Rules of Civil Procedure, applicable in bankruptcy, clearly further such a policy. See Kelso v. Maclaren, supra, 122 F. (2d) at page 870; cf. Kleid v. Ruthbell Coal Co., supra, 131 F. (2d) at page 373.
>
> * * *
>
> "As Mr. Justice Douglas put it in Case v. Los Angeles Lumber Products Co., 1939, 308 U.S.

106, 126-127, 60 S. Ct., 1, 12, 84 L. Ed. 110: 'And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages; which may flow to him as a consequence, as well as gaining all of the benefits.' "

The holding in the Nathan case (supra) was followed in *In re Germain,* 1956, (D.C. Cal.) 144 F.S. 678, where a similar problem arose, and the jurisdiction of the bankruptcy court was sustained. The District Court stated at page 682:

> "The filing of a claim in bankruptcy is a consent to the summary jurisdiction of the court to pass on its validity. The creditor 'thereby consents to the jurisdiction of the court to decide any defenses that may be lawfully interposed.' In Re Barnett, 2 Cir., 1926, 12 F. (2d) 73, 81."

To the same effect are the rulings in:

In the Matter of Petroleum Conversion Corporation, 1952, (3 Cir.), 196 F. (2d) 728;

In re Solar Manufacturing Corporation, 1952, (3 Cir.), 200 F. (2d) 327, 329;

Conway v. Union Bank of Switzerland, 1953, (2 Cir.), 204 F. (2d) 603, 606;

Interstate National Bank of Kansas City v. Luther, 1955, (10 Cir.), 221 F. (2d) 382, 388.

In the recent case, *Danning v. United States,* 1958, (9 Cir.) 259 F.(2d) 305, where a bankruptcy trustee filed a counterclaim to a claim of the United States for taxes, the summary jurisdiction of the bankruptcy

court was denied because there was no waiver of sovereign immunity, this Court, nevertheless, approved the rule in the *Nathan* case (supra), stating at page 306:

> "It is apparently conceded by both parties here that if the United States Government were not the party claimant, and a mere creditor had filed a claim against the bankrupt's estate, then the bankruptcy court would have jurisdiction to enter a summary judgment against the claimant upon a counter-claim asserted by the trustee as an objection to the claim.* * *"

---

4. **THE UNITED STATES DISTRICT COURT WAS CORRECT IN SUSTAINING THE JURISDICTION OF THE REFEREE IN ENJOINING APPELLANTS FROM PROCEEDING IN THE STATE COURT.**

Appellants argue that the rule in *Brehme v. Watson,* supra, holds that a bankruptcy court does not have the authority to restrain litigants in a state court action, because in so doing the restraint is against the court. That decision interpreted Section 2a(15), (11 U.S.C.A. Sec. 11(15)) as it read in 1933. It was amended by adoption of the Chandler Act in 1938, by adding the proviso that "an injunction to restrain a court may be issued by the judge only." The entire section now reads:

> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;"

The reasoning of Congress which prompted the amendment and the text interpreting its meaning is found in *Collier on Bankruptcy,* Vol. 1, p. 302:

> "In the House Report on the proposed revision of the Bankruptcy Act in 1937 it was said:
>
> 'There has also been some question about the power of referees to issue injunctions. The weight of authority seems to be that the referees may enjoin parties to a suit although they are prohibited by General Order XII clause 3, from enjoining the court itself, this power being reserved to the judge. As a matter of actual practice, of course, injunctions are not issued to restrain the court, but to restrain the parties litigating therein. These matters should be cleared up.'
>
> The 1938 Act thereupon added to former § 2a(15) the proviso that 'an injunction to restrain a court may be issued by the judge only.' The negative implication from the language alone would seem to be that in cases other than restraint of a court, the referee does have power to issue an injunction. Moreover, the revised General Order 12 only denies to the referee jurisdiction over those proceedings required by the Act or the General Orders to be had before the judge. In view of the recognition that the weight of authority favored the referee's power to grant stays, and in view of the general broadening of the referee's powers in the Act itself, it would seem strange for the legislative body not to prohibit specifically referees from exercising such power, had that been its intention. Nor is it convincing to argue that since in 'actual practice . . . injunctions are not issued to restrain a court', the pro-

viso is meaningless and should be completely disregarded. The phrase was injected in § 2a(15) to cover a possible contingency where in fact restraint of a court would be necessary. And actually such situations do occasionally arise, although normally restraint of the parties will suffice.

In the decided cases on the point to date, the courts have been unanimously in accord with this interpretation."

This interpretation was approved in *In re California Pea Products,* 1941, D.C. Cal. 37 F. S. 658, the Court stating at 662:

"It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent. As no such intent appears but, on the contrary, only a specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference."

In a situation where a bankruptcy referee made an order directing a creditor to refrain from making any claim against a fund deposited before bankruptcy, by the bankrupt, with a State Court, on the ground that the fund belonged to the trustee, it was held in *Aldrich Shoe Co. v. Kagan,* 1949 (1 Cir.) 173 F.2d 457, at page 460:

"Consequently the order appealed from then becomes justifiable under the general bankruptcy powers, including that to grant an injunction to

prevent interference with the enforcement of the Act. Bankruptcy Act, Sec. 2, sub. a (15), 11 U.S.C.A., Sec. 11, sub. a(15); * * *"

The foregoing decision followed the ruling of this Court in *In re Sterling,* 1942, (9 Cir.) 125 F.2d 104, where the referee made an order enjoining the drilling of an oil well. When the party enjoined disobeyed the order, a certificate for contempt was filed with the District Court. A motion to dismiss was granted on the ground that the referee had no jurisdiction to issue an injunction restraining the drilling of the oil well. This Court reversed the order of dismissal, and stated beginning at page 106:

"* * * The dismissal was predicated upon a supposed lack of jurisdiction. That courts of bankruptcy have jurisdiction to punish for contempts is clear. It is equally clear that such courts have jurisdiction to grant injunctions, and that ordinarily the violation of such an injunction constitutes a contempt. Conceding all this, appellees contend that the injunction in this case was granted without jurisdiction, and that, therefore, the Court had no jurisdiction to adjudge appellees in contempt for its violation.

"No point is made of the fact that the court, in granting the injunction, acted by its referee and not by the judge. Appellees apparently recognize, as we do, that the referee, in granting the injunction, acted as the court, and was the court. Appellees' contention is that the court itself—a district court of the United States sitting as a Court of Bankruptcy—had no jurisdiction to grant the injunction.

"The question of the court's jurisdiction to grant the injunction was raised by Bolsa Chica at the first hearing before the referee and was determined adversely to Bolsa Chica's contention by the referee's order of May 15, 1940. No review of the referee's order was sought or obtained. The time within which such review might have been sought expired long before the contempt certificate was filed. As to Bolsa Chica, therefore, the referee's order was and is conclusive; . . ." Citing *Arizona Power Corporation v. Smith,* 1941 (9 Cir.) 119 F.2d 888, 890.

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5. **APPELLANTS CONSIDERED THE BANKRUPT THE REAL PARTY IN INTEREST IN THIS PROCEEDING AND IN THE STATE COURT ACTION.**

The theory upon which the case was tried by both Appellants and Appellee was that the bankrupt was the true owner of the contract and the real party in interest.

The entire transcript of testimony at the proceedings concerns itself with performance, breach, and damages. Not once in the more than four hundred pages of testimony was the ownership of bankrupts questioned.

After urging upon the Court below that this same issue was before a State Court and that "full and absolute relief can be granted the parties in said Superior Court Action in Humboldt County" (Affidavit of Appellants' Counsel T. 36) and after introducing State Court pleadings for the proof of that *specific*

point—after urging the defense of comity, which presupposes common identity of parties and issues in two proceedings, and introducing the only *evidence* indicating a possible assignment in support of the comity defense—the Appellants now take the inconsistent position that the parties in interest are not the same, and that the pleadings introduced were brought in to demonstrate that proposition.

The record brought forward at the request of Appellants provides us only the affidavit of their counsel as to their contention at the time of lower Court action. The determination by the trial Court on the issue of the real party in interest was in accord with that position. It is unseemly in our law to invite action and then complain of it.

On the basis, then, that the theory of the case at trial conceded bankrupt was the real party in interest, Appellants should not now be heard to complain that it was not the proper theory.

5a. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING OF THE REFEREE, AFFIRMED BY THE DISTRICT COURT, THAT THE TRUSTEE OWNED THE RIGHTS UNDER THE CONTRACT.

Disregarding the ensaddlement of different mounts by the Appellants in their efforts to bring home a winner, there still remains in the record before us evidentiary basis supporting the determination that the bankrupt owned the rights under the contract.

In determining the ownership of a cause of action and in identifying the real party in interest, the Federal Court will apply the law of the state in which it sits. *American Fidelity and Casualty Co., Inc. v. All American Bus Lines,* 1949, 10 Cir., 179 F. (2d) 7; *Young v. Garrett,* 1945, 8 Cir., 149 F. (2d) 223; *Erie v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487. The same rule applies in determining who has burden of proof. *New York Life Ins. v. Rogers,* 126 F. (2d) 784, 1942, 9 Cir.; *Department of Water & Power v. Andersen,* 1938, 9 Cir., 95 F. (2d) 577.

California decisions as to ownership and real party in interest hold pleadings are not evidence to prove the truth of the facts therein contained. *Garfield v. Knight's Ferry,* 14 Cal. 35; *Goodwin v. Hammond,* 13 Cal. 168; *Bostic v. Love,* 16 Cal. 69; *Gajanich v. Gregory,* 116 C.A. 622; *Campbell v. Rice,* 22 C.A. 734.

> "That the Answer is not evidence for the defendant." *(Goodwin v. Hammond,* supra.)
>
> "It is very true that a pleading is not proof for the party making it." *(Garfield v. Knight's Ferry,* supra.)

Bostic v. Love, supra, says at the bottom of page 72:

> "The answer is not evidence for the defendant, but only pleading."

In *Campbell v. Rice,* supra, the Court holds that a bill of particulars served upon the defendant in response to his demand therefor is but an amplification of the complaint, its purpose being to apprise the defendant

of the specific demand of his adversary, and it is no more admissible in evidence than a copy of the complaint. In *Gajanich v. Gregory,* supra, the Court states on page 629:

> "The pleading was not admissible in evidence as evidence of the fact so stated." (Citing cases.)

In commenting upon the role of pleadings in a legal action, the Court states in *Casaretto v. DeLucchi,* 76 C.A. 2d 800, on page 806:

> "The function of pleadings is to inform the parties within reasonable limits of the nature of the action pending and the issues involved. It is not to create traps that will require a reversal for non-prejudicial errors."

In further comment on pleadings, the case of *Buxbom v. Smith,* 23 Cal. 2d 535, says as follows on page 543:

> "Moreover the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleading misled the unsuccessful litigant to his injury. (citing cases) Consistent with these liberal principles is the mandate of Section 4½ of Article VI of the State Constitution 'No judgment shall be set aside . . . for any error as to any matter of pleading . . . unless after an examination of the entire cause including the evidence the Court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' "

A pleader is bound only as to issuable facts. 39 *Cal. Jur.* 2d on Pleading, Section 14, page 22. He is not

bound by irrelevant facts or evidentiary facts which may be pleaded.

In this proceeding, the point here at issue is the ownership of the contract rights. The manner of acquisition of ownership is not in issue—the ultimate fact to be determined, and as to which the issue concerns itself, is ownership, nothing more and nothing less.

In pleading ownership, the pleader is required only to state the fact of ownership and not the deraignment of title, and in an instance where such deraignment of title is alleged, it is surplusage and irrelevant material, 39 *Cal. Jur.* 2d on Pleading, Section 21, page 32. It is both unnecessary and improper to plead such evidentiary matter.

In *Larco v. Casaneuava,* 30 Cal. 560, the Court says on page 565:

> "It is therefore either immaterial matter which encumbers the record and which the defendants if so inclined have a right to have removed; or it is a matter of evidence which ought not to be inserted in a pleading under our system even where it consists of a deraignment of title in an action of ejectment."

In *McCaughey v. Schuette,* 177 Cal. 223, the Court holds that the only proper pleading is ultimate facts and not evidentiary or probative facts which would tend to prove the ultimate issue of ownership.

In the case of *Harris and Jacoby v. Hillegass,* 54 Cal. 463, the Court comments on evidentiary matter concerning the ultimate fact or issue on page 470 as follows:

> "Even where such statements if admitted to be true would establish prima facie an ultimate or pleadable fact, they cannot be substituted in a complaint or answer for an allegation of the fact to be put in issue."

Admissions in a complaint do not defeat a cause of action where they are probative rather than ultimate facts. 39 *Cal. Jur.* 2d on pleading, Section 21, Page 34.

Thus, it is obvious that, under applicable State decisions, neither Court nor parties are bound by the pleadings in a particular case nor are facts *established* merely by pleading. There is no requirement that the Court accept pleadings as determinative of an issue, particularly where the facts alleged are unnecessary surplusage.

In its effort to adjudicate controversies on the basis of the *real* facts and the *full* facts, the Federal Court has adopted Rule 15 (b) Federal Rules of Civil Procedure, allowing the Court to find the facts as they exist, whether pleaded or not. *(In re Germain,* 144 F. Supp. 678, at 683.)

Since pleadings in this proceeding are not evidence, the only *evidence* establishing the existence of an assignment by the bankrupt consists of an allegation contained in a pleading in another action, made by the purported assignee. (Claimant's 1.) Appellants must accept the theory that the assignee corporation is the same entity as the bankrupt; otherwise the allegation contained in its State Court pleading would not bind the bankrupt as an admission!

Even were the allegation of the State Court pleading considered as an admission of the bankrupt, it would not *compel* a finding in accordance therewith. *Nelson Bros. Coal Co. v. Perryman-Burns Coal Co.* 1931, 2 Cir., 48 F. 2d 99. In that case the Court observes at page 101:

> "We think the statements by Perryman-Burns Coal Company Inc. which were made in the former litigation were no more than matters of opinion, . . ."

While such evidence might be sufficient to support a finding in accordance therewith, it certainly does not compel such a finding. In the face of other evidence to the contrary, it would, at most, but serve to create a conflict.

As Judge Halbert pointed out in his Order (T. 74), there is nothing before this Court by way of transcript of the proceedings wherein the defense of *jus tertii* raised by Appellants in their motion to withdraw the claim and plea in abatement was disposed of by the Referee adversely to Appellants. It may have been on procedural grounds (FRCP 25 (c), 12 (h), or 19 (b)) and/or substantive (corporate assignee not sufficiently separated from bankrupt—see affidavit of Appellants' Counsel (T. 36)—"That it affirmatively appears from the pleadings on file in said action (brought by corporate assignee and to which bankrupt was not a party) and from the documents on file herein that full and absolute relief can be granted the parties in said Superior Court action in Humboldt County"—wherein Appellants apparently recognize no distinction between the corporation and the bank-

rupt.) *(In re Gillespie Tire Co.* 1942, 54 F. Supp. 336.) In any event, the burden is upon the Appellants to point out *specifically* the error of the Court below and the *recorded facts* demonstrating the error. *(Humphreys Gold Corp. v. Lewis* 1937, 9 Cir. 90 F. 2d 896.) Without having brought forward the record surrounding the ruling, how can Appellants successfully attack or criticize it?

This Court has repeatedly held that where a record is not brought up, the findings of fact and conclusions of law of the trial court must be presumed to be correct. *Rickard v. Thompson,* 1934, 9 Cir., 72 F. 2d 807, 809; *Bakersfield Abstract Co. v. Buckley,* 1938, 9 Cir., 100 F. 2d 530, 532. This rule was followed in *In re Hurt,* 1955, D.C. Cal., 129 F. Supp. 94, 97.

However, on the merits, there is evidence sufficient to establish a *prima facie* ownership of the cause of action in the bankrupt.

Appellee showed that the instrument (Trustee's 1) was executed by Appellant Peters and bankrupt, naming bankrupt obligee as to its rights in the contract. (T. 89.) The document was in possession of bankrupt from which a presumption of delivery follows. The contract was introduced into evidence. (T. 90—Trustee's 1.) The contract itself expressly provided that it was not assignable. (T. 9, Sec. 12.) The remainder of the record shows on almost every page performance by bankrupt, accepted by Appellants, and payment by Appellants to bankrupt of monies due under the contract. (Trustee's 6 through 12—T. 172 et seq.) Nowhere in the *evidence* (save for the alle-

gations of the purported assignee in other litigation) is there any suggestion of assignment by the bankrupt.

California adopts the presumption of continuation stated as follows at § 1963, sub. 32, *C. C. P.*:

> "That a thing once proved to exist continues as long as is usual with things of that nature."

That presumption has been extended to include title to real property and under State law, to personal property. 18 *Cal. Jur.* 2d on Evidence, Section 84, page 514 and cases there cited. Under that presumption, it would be necessary for the trustee to prove only that the contract was made in the name of, and was therefore prima facie the property of, the bankrupt in order to support a finding of ownership.

That doctrine of pleading and proof of ownership has been adopted in a number of cases in California and represents the law of the State. In *Hook v. White,* 36 Cal. 299, the Court says:

> "The making and delivery of a promissory note by defendant to plaintiff imports a liability to pay in accordance with its terms without any averment of a continuous holding or ownership; and after the allegation of the execution of the promissory note to plaintiff by defendant, a further allegation that plaintiff is still the owner and holder thereof would be surplusage."

In *Monroe v. Fohl,* 72 Cal. 568, the Court says on page 570:

> "The execution and delivery of the note payable to the order of plaintiff being admitted the

> denial that plaintiff was the 'holder' of the note and the assertion that the Bank was the holder without averring any facts showing such to be the case were of conclusions merely and raised no issue."

In *Waldrip v. Black,* 74 Cal. 409, an endorsement naming the plaintiff as owner entitled the Court to presume, there being no evidence to the contrary, that he was the owner of it. In *Cassinella v. Allen,* 168 Cal. 677 the Court states on page 682:

> "The only other point made that is worthy of notice is that the evidence does not support the finding of plaintiff's ownership of the note. The note bearing the endorsement in blank of Whitmore, the payee, was introduced in evidence by the plaintiff. Plaintiff's attorney testified that he had bought the note of Whitemore for plaintiff, paying for the same with money furnished by the plaintiff. This was enough to establish *prima facie,* plaintiff's ownership. . . . (citing cases) . . . The chain of title was not impaired by the fact that the instrument bore another indorsement, concerning which no proof was offered."

In *Shafer v. Willis,* 124 Cal. 36, the Court holds on page 38:

> "It was alleged in the complaint and not denied in the answer that defendants made the note and delivered the same to plaintiff as payee. This note was produced at the trial and offered in evidence by plaintiff without objection. This was sufficient evidence to support the finding of ownership."

Thus it will be seen that under the California law, pleadings other than bare allegation of ownership are

surplusage and should be disregarded, and that proving ownership of a chose in action is sufficient merely by producing the chose in action naming the plaintiff as the obligee thereof and the introduction of the same into evidence. That and nothing more is sufficient to make a prima facie case of ownership.

The only confusing factor in this picture is the pleading of the matter wherein references are made to assignments and invalid assignments, et cetera. However, from the authorities above noted, pleadings are not evidence. The only ultimate factual issue was ownership. All that was required under the California authorities to prove ownership was proved, and until the Appellants came forward with evidence of the existence of the rights of a third party there was no further duty on the part of Appellee to proceed with any further proof. At that juncture also the referee had sufficient evidence to support a finding of ownership in favor of Appellee.

The pleading of a defense that the right sued upon belongs to a third party is an affirmative defense and must be pleaded in order to raise the issue. Since it is then the duty and obligation of the Appellants herein to raise the defense and plead the same, it follows that they must assume the burden of proof as to such defense and must affirmatively show that the rights vested in a third person.

The question of ownership of a cause of action on a note and mortgage was raised in a situation where the note and mortgage was assigned to one S. C.

Hastings after which the latter's daughter acquired the note and mortgage by way of a gift. Upon the assignee donor's death an action to enforce the claim was commenced by a testamentary trustee. The defendant maker raised the defense that the action was not brought by the real party in interest and therefore he could not tell to whom to pay the amount found due, nor with safety redeem in event of a sale. In overruling this defense the California Supreme Court, in *Giselman v. Starr,* 1895, 106 Cal. 651, stated at page 658:

> ". . . The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. These are cases where *prima facie* legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the *prima facie* legal owner."

And, in a negligence action, concerning damages to personal property, the California Supreme Court in *Anheuser-Busch, Inc. v. Starley,* 1946, 28 C. 2d 347, stated at page 352:

> ". . . where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from further annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. . . . As we have seen, such protection is afforded in the case at bar."

An objection that a plaintiff is not prosecuting an action in good faith or is not the real party in interest should be determined by *proof on the trial* and *not upon the pleadings or affidavits.* 39 Am. Jur. on Parties, Section 108, page 981.

When Appellees introduced the agreement (T. 90), executed by Appellants as obligor, and Snow Camp Logging Company as obligee, a prima facie case of ownership was established in favor of the bankrupt, Snow Camp Logging Company, sufficient to support a judgment. The assertion of lack of ownership as a defense asserted by Appellants must be proved. This they have failed to do. The State Court pleadings introduced in evidence—that being the only evidence in Appellants' favor on this issue—at most raised a conflict. The resolution of this conflict was a matter for the trial court.

Therefore, on the basis of the theory followed at trial by Appellants, and the evidence adduced, the Court below did not err in its finding that ownership of the contract was in bankrupt.

6. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO ANTICIPATORY BREACH OF THE CONTRACT BY THE BANKRUPT.

Appellants contend that the bankrupt repudiated its contract obligation to Appellants by agreeing to supply logs to other mills.

Section 3 of the contract involved (T. 7), obligated bankrupt to supply the logs required by the buyer. The only prohibition against sale of logs to others is found in Section 8 (T. 8) which provides: "Seller shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production on that type of log. In the event Buyer ceases production upon any type of log, or cuts back on production, Seller shall have the right to sell any of such logs as Buyer does not require, upon the open market and to other Buyers."

This provision obviously calls for a number of definitions as to what constitutes full production; how is the Seller to be notified of full production; what the contemplation of the parties was as to full production; and the nature and scope of the contract as to the timber area and operations to which it applied. These are all fact questions to be determined by the trial court.

At the outset of the contract, full production was estimated at between five and six million board feet a month. (T. 95.) Actual production achieved during the entire period of 1953 was approximately 2,200,000 feet per month. (Trustee's 14.) Appellants operated through a portion of the summer and particularly in

July and August, at three shifts per day, but prior to the first of September, 1953, cut back to two shifts. (T. 409-410.) During the first half of September, the mill was not operating at full production. (T. 410.) During all that time Appellant's pond was full of logs. (T. 406.) After cutting back from three shift operation in August, full production was never resumed. (T. 406.) On September 12, 1953, under this fact situation the Appellants claimed to be in full production. (Claimants' Exhibit No. 4.) Appellants made no other demand upon the bankrupt in this connection either before or after.

Gang logs were defined in the contract as being any log 32 inches or less in diameter. (T. 8, Section 5.) Accordingly any log larger than 32 inches was exempt from the coverage of the contract.

The contract contemplated the operations of both parties in the Redwood Creek area only, (T. 6, T. 9, Section 13, T. 10, Section 17) *and accordingly obligated log production of the Sellers in that area only.*

Bankrupt maintained logging operations in the Blue Lake area and in the Snow Camp area. (T. 374.)

Under those provisions of the contract then, clearly bankrupt was entitled to sell all of its production from the Blue Lake area and Snow Camp area to whomsoever it chose and to sell all logs above 32 inches in diameter at all times to anyone whomsoever it chose, and as to logs produced in the Redwood Creek area only, which were 32 inches in diameter or less, it could sell to any mill at any time that Appellants were not in full production.

For any contract with another mill calling for sales of logs to such other mill to become material to the issues of this case, it would have to appear affirmatively from the contract itself and from the foundation laid, that it must of necessity be supplied out of *logs 32 inches or less in diameter produced in the Redwood Creek area and at a time when Appellants were in full production.*

It would also appear to be a matter of common sense that the Appellants would not be entitled to complain of a violation of the restrictive sales section of the agreement (Section 8) until notification of full production had been given to bankrupt and demand made for compliance therewith. This was not done until September 12, 1953, at a time when the mill was admittedly barely in operation and under a severe curtailment of production. There is no evidence in the record of when, if at all, "full production" was regained after the September shutdown. Significant, however, is that the claim of full production in Appellants' No. 4 came at a time when its production was at its lowest ebb.

Error is assigned by the Appellants in this connection specifically as it relates itself to rejection of an offer of proof set out in Appendix A, AOB.

Primarily it must be kept in mind that the lack of relevancy and materiality of the contract offered was questioned on the basis of the showing made at the time of the offer (T. 373), and that the objection to its reception in evidence was limited to the showing made at that time. The Referee observes on page 373,

"I cannot see the relevancy of the question at this time. Later on in the proceedings, you may show it, but at this time the objection is sustained so far as the other contract is concerned."

The foundation for the admission of the Western Studs contract at the time of its offer consisted simply of the fact that Appellants had sometimes been in full production, sometimes not. (T. 365.) The contractual definition of a gang log was entirely overlooked in any foundational examination of the witnesses. It consisted of the gratuitous statement that "gang logs can also be called stud logs". (T. 366.) The bankrupt was logging not only in the Redwood Creek area but the Snow Camp area and the Blue Lake area. (T. 374.) The Snow Camp area and the Blue Lake Creek areas were not covered in the contract at issue. There was no evidence of the production being achieved from the Snow Camp area and the Blue Lake Creek area as being adequate or inadequate to supply the proffered Western Studs requirements. There was no evidence that Western Studs purchased the type of log defined as a "gang log" in the contract. On the basis of the foundation in evidence at the time of the offer of the proof, it was properly denied as irrelevant and immaterial.

Subsequent to the offer of proof, it developed that more than eleven million feet came off of the Snow Camp show in 1951 alone; in 1953, fifteen million feet came off production other than the Redwood Creek Ranch. (T. 386.) Thus it can be seen that the volume of production from areas other than covered by the

contract in issue was sufficient to supply the requirements of the Western Studs contract. It further developed that the requirements at Western Studs were for a sixty-inch log and that they did not like the smaller ones. (T. 400-401.) Thus it can be seen that presumably the Western Studs agreement did not call for logs of the type defined in the contract at issue here as "gang logs".

There is no showing that the alleged Western Studs agreement amounted to a renunciation of the obligations to provide all of Appellants' log requirements. It appears to be abundantly conceded that the Appellants received all the logs they wanted at all times until October 21, 1953, the date of contract termination. Particularly noteworthy in connection with this argument is the testimony of Mr. Peters (T. 432):

> "Q. Now at any time during this operation, Mr. Peters, did you ask Mr. Vander Jack to increase or decrease his logging operation up there?
> A. I tried to get him to decrease it.
> Q. Did you ever ask him to increase it?
> A. Never.
> Q. You say you did ask him to decrease it.
> A. Yes."

Not being able to criticize the volume produced and delivered pursuant to the contract, the Appellants seek to rely upon this extraneous contract with Western Studs as working some sort of renunciation or anticipatory breach. In doing so, Appellants ask the Court to ignore what was actually done by way of adequately supplying Appellants at all times with logs, and to

look instead to a devious theory of renunciation by normal business conduct with other mills whose business was required in order to absorb the entire log production of bankrupt of logs not covered by the contract in issue.

Nowhere is there suggested a renunciation communicated from bankrupt to Appellants. In order to establish an anticipatory breach, some such showing would have had to be made. It is not sufficient for bankrupt to tell Western Studs that it no longer intends to supply logs to Appellants, even if that had been the case. *Restatement of Contracts,* Section 318, Illustration No. 3, *12 Cal. Jur. 2d on Contracts,* Section 245, adopted as the law of the State of California in *Pattie v. Berryman,* 95 C.A. 2d 159 at page 170.

In view then of the facts known to the Court at the time the Western Studs contract was offered, it was properly excluded; and in any event—since it related only to a time of full production by Appellants—its exclusion was not prejudicial inasmuch as the Court after the full hearing of the matter, concluded that the only notice of claimed full production was made September 12, 1953 pursuant to Claimants' No. 4, and that at that time Appellants were not in full production and that the demand made by them on that day was not made in good faith. (Findings of Fact 20. T. 52.) That finding is not attacked upon appeal.

7. ATTEMPT OF APPELLANT TO TESTIFY AS TO CONTENTS OF RECORDS WITHOUT PRODUCING SAME WAS PROPERLY REJECTED.

Appellants, at AOB 30 and 31, raise the point that Appellant Peters was not allowed to testify. Appellant Peters testified that he kept no records of daily production, log deck scales, or log purchases, (T. 169), and after his bookkeepers and accountants had been called to testify as to the information kept by them on behalf of Appellants—the self same records which Appellant said he did not keep—Appellant Peters then sought to testify from a recap of records that he had made. (T. 439-442.) Repeated requests were made for the records to be produced. Subpoenas were served resulting in the statement that no such records were kept (T. 169) and requests were made in Court (T. 441, T. 457) but the same were never produced.

Code of Civil Procedure, Section 1855 of the State of California provides the Court with authority to receive secondary evidence of accounts and other documents, but it does not compel the Court to accept them in instances where as here there is considerable suspicion attached to the manner in which the secondary summaries were compiled.

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8. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND THE APPELLANTS.

It is well established that accord and satisfaction is available to an obligor where a sum less than the contract price has been paid in settlement of a *bona fide*

dispute. It is also well settled that the obligor cannot shortchange his obligee in the absence of a bona fide dispute and rely upon retention and cashing of the sum offered as a discharge of his complete obligation.

The law in California is set out very aptly in *Edgar v. Hitch,* 46 Cal. 2d 309. In that case, hay had been purchased and sold at $42.50 a ton and it later appeared that a dispute may have arisen regarding the rain damage of some of the hay with a final settlement price of $32.50 per ton being paid by the buyer for that portion and accepted in cash, under protest, by Seller. The trial court found against the defendant Buyer with the defense of accord and satisfaction being interposed. The California Supreme Court reversed the trial court and remanded the case for a definite finding on the existence of a good faith dispute.

In the case before us the trial court has expressly found that there was no good faith dispute. (Finding of Fact No. 10, T. 50.) Therefore the scope of the inquiry here would be limited to whether or not there was any substantial evidence to support such a finding.

Appellants have set out in Appendix D the testimony of Appellant Peters in this connection, and from which it can be gleaned that (1) Peters claimed the reduction was by some sort of an agreement; (2) he did not know what the agreement was; (3) he was willing to take at least three guesses at it before the examination was terminated by the counsel for the Appellee. Nowhere in his testimony did he suggest a

dispute as to the proper method of computing the price according to the contract in issue here. As an addition to the record in this respect set out in Appendix D, AOB, we would add the following from transcript. (T. 402-403):

"Q. You had been delivering logs to Timber Incorporated and Peters Mill for sometime prior to this period, had you not?

A. I had.

Q. And all those deliveries were under this contract that is in evidence?

A. That is right.

Q. Had, during that time, any procedure been used consistently for the determination of the Arcata market price?

A. Well, we sold to as many as six or seven mills other than Peters in that area and they were the major mills there, probably constituted 75% to 90% of the mills. That was a fair standard for the market, I am sure, and that was always acceptable to Mr. Peters.

Q. And that procedure had been used during the entire performance of the contract?

A. That is correct.

Q. The same procedure establishing the market per the invoices you submitted?

A. That is right.

Q. There was no objection ever conveyed to you that this was not the proper method to use?

A. No, there never was.

Q. To compute the price under the contract?

A. No.

Q. In other words, there was no dispute about that?

A. No dispute about it at all."

The last cited testimony alone would be sufficient for the trial court to conclude that there was no good faith dispute and sufficient evidence to support the Court's finding that there was none.

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9. THE DISTRICT COURT DID NOT ERR IN FINDING THE DAMAGES AWARDED ARE FULLY SUPPORTED BY THE EVIDENCE.

Four elements of damage appear in the findings of fact in this case, as set out in the Appellants' Opening Brief, page 35. We concur wholeheartedly in the suggestion made that the burden of proof as to these damages rested with the Appellee. We contend that the Appellee sustained that burden of proof and the Referee having made his finding in that connection based upon substantial evidence, and the District Court having affirmed, we submit that it is now a fact question into which this Court will not inquire.

The amounts awarded in the first two elements of damage, to wit: the underpayment by the Appellants to the bankrupt for logs delivered in the sum of $19,625.91 is not questioned by Appellants insofar as the amount is concerned. The Appellants also state their capacity to comprehend the manner in which the $30,931.57 loss of truck earnings is computed. (AOB 35.)

Therefore, the only matters with which we need concern ourselves at this juncture is the $146,319.00 awarded for disruption of normal operating procedures and the $477,750.99 awarded for loss of sales

price advantage of future performance called for by the contract.

The item awarded for truck earnings as set out in AOB 36 concerns itself only with the loss of use of trucking equipment of substantial value: there were 5 International trucks at $17,000 per unit, and 12 GMC trucks at $20,000 per unit. (T. 98.) This was based primarily upon Trustee's Exhibit No. 18 which applied only to truck earnings for average trucks in the area at the time, based upon their actual earnings. It did not in any manner take into account the man hours required to operate the trucks. Those were reserved for the third element of damage set forth, to wit: the disruption of normal operating procedures. There is no need to be deceived here just as the trial court and the District Court were not deceived by an attempt to confuse this element of damage relating to loss of use of equipment with the loss of man hours.

The loss of man hours relates itself to the loss of the wages paid to the truck driver plus the wages paid to the logging crews who cut the timber, prepared it for loading and loaded it upon the trucks. Those man hour losses are set out in the computation of the third element of damage—disruption of normal operating procedures.

Trustee's Exhibits Nos. 14-18, considered in connection with the testimony contained in the record, (T. 297-321) and the reference to the cost per hour to maintain a crew in the woods per hour for the man hours alone as shown by the record (T. 114-120), constitutes adequate substantial evidence from which the

Courts below could and did ascertain damages to exist as found.

The Appellants would seek to capitalize upon an apparent error in one of the Exhibits in evidence wherein January 1st, 1953 through September 31, 1953 is stated to be an eight-month period. Upon the face of it, that is a mistake. We must not, however, necessarily conclude that it was upon the basis of that evidence solely that damages were computed. It would appear from the record that the figures contained in the Trustee's Exhibit 15 may have been adopted by the Court below in computing damages. There is no compulsion to that view, however, inasmuch as testimony has previously been referred to showing amounts of logs delivered which are not in complete agreement with that Exhibit.

Even should it be conceded, however, that the fourth element of damages, to wit: the loss of sale price advantage on future performance is erroneously computed based upon an error in one of the exhibits, it would but amount to an adjustment of approximately $53,000 in the judgment.

The remainder of the Appellants' discussion of damages can be dismissed as but wishful thinking. It adds up merely to an attempt to limit damages for future performance to the inventory upon the merchant's shelf at the date of breach. It does not take into account future acquisitions of inventory and would lead to the absurd result that a seller, in order to obtain compensation for breached contracts calling for long-term deliveries must at all times during those

contract performances be required to maintain an inventory sufficient to supply a ten-year demand. Such a theory hardly deserves serious consideration.

In AOB 40 and 41 the ridiculous suggestion is made that since other mills were being supplied with logs by the bankrupt that therefore any award of damages for future deliveries would necessarily include a duplicate payment for them. As has been observed, the bankrupt had production over and above and aside from that covered under this contract sufficient to supply adequately all other commitments. After repudiation of the contract by Appellants, bankrupt was required to deliver all its production to other mills. (T. 297.) The record shows without dispute (T. 300-302) that it cost $10.31 per thousand to deliver logs to any available market other than Appellants' mill, and $4.00 per thousand to Appellants' mill. This differential of $6.31 per thousand resulted from additional distances to available markets. The bankrupt under the contract (T. 7, Section 4) was required to surrender only $4.00 per thousand of the $6.31 delivery price advantage to Appellants. The damages awarded were as claimed and computed upon the basis of the loss of $2.31 per thousand price advantage. This is the proper measure of damages. (Calif. Civil Code, Sec. 3353.) This rate per thousand, multiplied by the fair and reasonable estimate of volume which should have been accepted by Appellants during the unexpired life of the contract produces the sum of $477,750.99 as to this element of damage.

It is also interesting to note that mathematical errors alleged to have occurred in the computation of damages have not been urged nor presented to the Referee nor to the District Court heretofore, but are raised for the first time upon appeal to this Court. If the errors were as patent as Appellants would seek to lead us to believe, they would have been discovered ere now.

In presenting to this Court references to the transcript and to the Trustee's exhibits in evidence Appellee has shown that the Referee and the District Court had adequate support in awarding damages in the amount of $674,627.47.

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10. THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED FOR THE REASON THAT IT PROPERLY AFFIRMED AND ADOPTED THE ORDER OF THE TRIAL COURT.

It is said in *In re Penfield Distilling Co.*, 1942, 6 Cir., 131 F. 2d 694 at 695:

> "Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, on anything less than a demonstration of plain mistake."

Rule 52 (a) of the Federal Rules of Civil Procedure (28 U.S.C.A. following sec. 723c), provides:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The referee as trier of the facts made a specific finding (T. 53, No. 25) that he did not believe the testimony of appellants nor that of the witnesses presented in their behalf. The record amply supports such finding. This Court approved the findings of a referee which had been reversed by the judge of the District Court in the case of *Acme Distributing Company v. Collins,* 1957 (9 Cir.), 247 F. 2d 607, and stated at page 613:

> "In Ott v. Thurston, 9 Cir., 1935, 76 F. 2d 368, 369, the late Judge Garrecht said:
>
> 'Another error stressed by appellant is that the judge of the District Court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the District Court stated in its opinion: The evidence was at least conflicting, the District Court is not at liberty to disregard the Referee's finding (sic) for they had sufficient support in the evidence.' *The court was here expressing the general rule of practice on review on appeal.*
>
> "'It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions of questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the Court.' (Cases cited.)" (Emphasis supplied.)
>
> "In the instant case, we are unable to understand how 'the sense of justice of the learned

> Chancellor was offended by the careful and well-documented findings of the Referee.' ''

In *Hudson v. Wylie,* 1957, 9 Cir., 242 F. 2d 435, this Court reviewed numerous decisions of this and other Circuits covering a variety of situations with respect to petitions for review and the assailability of a referee's findings, and quoted from *Ott v. Thurston* (supra), stating at page 451:

> ''* * * And the findings of a Chancellor, based on testimony in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' Neece v. Higgins, 9 Cir., 72 F. 2d 791, 796; Exchange Nat. Bank (of Spokane) v. Meikle, 9 Cir., 61 F. 2d 176, 179.''

To the same effect are the holdings of the Court in the following cases:

Lines v. Falstaff, 1956, 9 Cir., 233 F. 2d 927, 930;

Earhart v. Callan, 1955, 9 Cir., 221 F. 2d 160, 164 (Certiorari denied, 1955, 350 U.S. 829, 76 S. Ct. 59);

In re Magnet Oil Co., 9 Cir., 119 F. 2d 260, 261-262.

On the same subject this Court in *Heath v. Helmick,* 1949, 9 Cir., 173 F. 2d 157, stated at page 162:

> ''* * * In any event, this court would be constrained to support the findings of a referee who saw the witnesses, where these are fully supported by the record and are concurred in by the trial court on review.'' (Citing Kimm v. Cox, 8 Cir.,

130 F. 2d 721; Goldstein v. Polakoff, 9 Cir., 135 F. 2d 45.)"

And in *Goldstein v. Polakoff* (supra), where the Court stated at page 45:

"Recitation of the evidence follows in the brief and we have given it close attention. There is, however, nothing before us but a request that we try the case de novo on the record. It is true that appellant states in each of his 'Specifications of Errors' as to the court's findings that 'the finding * * * is against the weight of and not supported by the substantial evidence.' But in each instance the issue turns upon the trial court's conclusion from substantial documentary evidence together with highly conflicting testimony of witnesses relating thereto.

Suffice it to say that, applying Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., following Section 723c, in giving '* * * due regard * * * to the opportunity of the trial court to judge of the credibility of the witnesses.' We do not find the trial court's findings of fact 'clearly erroneous.'"

Similarly in *Wittmayer v. United States,* 1941, 9 Cir., 118 F. 2d 808, this Court stated at page 811:

"As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses' 'depends upon conflicting testimony or upon the credibility

of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

The Appellee therefore respectfully submits that the order of the District Court, confirming the order of the Referee, should be affirmed.

Dated, San Francisco, California,
July 30, 1959.

MAX H. MARGOLIS,
FREDERICK L. HILGER,
Attorneys for Appellee.

No. 16,322

United States Court of Appeals

For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,

Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
1811 Mills Tower, San Francisco 4, California,
Attorneys for Appellants.

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Statutes

No. 16,322

United States Court of Appeals

For the Ninth Circuit

S. A. Peters and Timber, Inc., of California,
Appellants,

vs.

Kal W. Lines, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,
Appellee.

APPELLANTS' REPLY BRIEF.

STATEMENT OF FACTS.

While in his brief Appellee attempts to take issue with the soundness of Appellants' "Statement of Facts", we feel that the statement (A.O.B., pp. 10-12) is well documented in the record and is supported by the citations to the record contained therein.

Appellee's "Statement of Facts" is, we submit, much more of an argument than a statement of facts, and most of the observations contained therein are repeated at various stages of Appellee's brief as part of his argument. The inapplicability of the selected, and we submit slanted, statements made by Appellee

in his "Statement of Facts" becomes more apparent later in this rebuttal. However, one glaring defect appears on page 9 of Appellee's Brief. Appellee attempts to charge Appellants with damages at $28.50 per hour for "woods workers' wages alone for each crew", on a basis of 30% of the total hours (17,113) worked during the period June 1—October 15, 1933 (Trustee's Exhibit No. 17) or 5,134 hours at $28.50 per hour for wages alone ($146,319). This computation totally ignores the fact that, as is indicated in the record and conceded at the trial by counsel for Appellee (T. R. p. 312):

> "Mr. Stark. Mr. Hilger, at this point do I understand that these figures are going into the record covering the cost of timber, hauling, deliveries, for 100 per cent of *Snow Camp's production, of which we got only 40 per cent?*
>
> Mr. Hilger. The payroll, of course, relates to the entire operation. That is correct, yes.
>
> Mr. Stark. And with the exception of the footage of lumber——
>
> Mr. Hilger. Designated specifically as Timber, Inc.; otherwise they cover the entire operation.
>
> Mr. Stark. Under no theory could we be charged with more than 40 per cent.
>
> Mr. Hilger. *That would appear to be fairly correct.*" (Italics ours.)

We should be charged, if with anything, with no more than on 40% of the total production. In other words, instead of being chargeable, on Appellee's theory of damages on this item, with 5,134 hours "wasted", we should be chargeable only with 40% of such time or a

total of 2,053 hours, or a total (at $28.50 per hour) of only $58,510.00 instead of $146,319.00.

ARGUMENT.

1. SUMMARY JURISDICTION OF BANKRUPTCY COURT TO AWARD AFFIRMATIVE RELIEF UPON TRUSTEE'S OBJECTIONS TO A CLAIM FILED IS AT BEST DOUBTFUL.

As pointed out in Appellants' Opening Brief (pp. 12-14), there appears to be a conflict of authority between the 5th Circuit and the 10th Circuit, and between various District Courts throughout the United States aligning themselves, respectively, with the decisions of *B. F. Avery & Sons Co. v. Davis,* 1951, 192 F. 2d 255 (5th Cir.) cert. den. 342 U.S. 945 and *Inter-State National Bank of Kansas City v. Luther,* 1955, 221 F. 2d 382 (10th Cir.). We believe the better and more consistent theory and one more conducive to better bankruptcy administration and the rule most likely to produce substantial justice is that for which the 5th Circuit stands, viz: That summary jurisdiction does not lie in the Bankruptcy Court to grant affirmative relief to the Trustee against a creditor who has filed a claim.

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2. COMITY REQUIRED SURRENDER OF SUMMARY JURISDICTION BY THE BANKRUPTCY COURT TO THE STATE SUPERIOR COURT.

(a) In support of his contention that comity did not exist in the instant case, Appellee cites *Manter v. Howard,* 1949, 94 C.A. 2d 404. This decision is not in point because, in the *Manter* case, the parties pro-

ceeded to judgment in the State Court *after* the Bankruptcy Court had issued its restraining order preventing the parties from so doing. The Court held there, properly, of course, that the Trustee could set that judgment aside. This is not the case here. Appellants, at the outset, objected to the jurisdiction of the Bankruptcy Court and formally moved for permission to pursue the matter in the State Courts. In the case of *Heider v. McAllister,* 1958 (9th Cir.), 265 F. 2d 486, also cited by Appellee, we also find a clear distinction from the case at bar. In the *Heider* case, the Court found that the subject matter proposed to be litigated in the State Court was different from that which was proposed to be litigated in the Bankruptcy Court. In the case at bar, the subject matter of the two actions (Humboldt County Superior Court and the instant Trustee's Objections and Petition for Affirmative Relief) is identical.

(b) Although we will more fully discuss that subject later in this brief in connection with the "real party in interest", we here observe that at no time have we conceded that the real parties in interest in the State Court action, and in the controversy before the Bankruptcy Court are or were the same. The mere fact that Appellants moved to withdraw their claim and to have the issues raised by the pleadings tried in the State Court action prior to the trial in the Bankruptcy Court is not inconsistent with the present position of Appellants. It was only because of the adverse ruling of the Referee on our objection to his summary jurisdiction that we may urge that

the real party in interest here was not the Trustee but Snow Camp Logging Co., a corporation.

(c) Contrary to the observation of Appellee "that in Bankruptcy proceedings, comity does not prevail" (Appellee's Brief, p. 25), the decision of the U.S. Supreme Court in *Toucey v. New York Life Insurance Company,* 1941, 314 U.S. 118, 86 L. Ed. 100, *does not* so hold. The Supreme Court held that Section 265 of the Judicial Code deprives Federal Courts of the right to issue injunctions against proceedings just to save a defendant from the inconvenience of pleading and proving *res adjudicata.* In passing, the Supreme Court stated that Section 265 Judicial Code expressly excepts cases where such injunctions "may be authorized by any law relating to proceedings in bankruptcy". This merely affirms the well-known power of the Bankruptcy Court (11 U.S.C.A. 25(15), Bankruptcy Act Section 2(15)), to issue all types of injunctions, but does not, by any stretch of the imagination, deprive the Bankruptcy Courts or litigants of the benefits or relieve them from the burdens of the well-known equitable doctrine of "comity".

Appellants contend that the possible loss to a litigant of his right to a jury trial, where, as here, it is urged as part of the doctrine of "comity", is not itself dependent upon whether or not Appellants, or any particular litigants, undertake to avail themselves of that right. The fact that here the State Court case was re-set for trial without a jury, with the consent of Appellants, does not amount to a waiver of the right so far as comity is concerned.

The citation by Appellee of *Inter-State National Bank v. Luther,* supra (at Appellee's Brief, p. 27), to us only serves to emphasize the confusion which frequently occurs between the doctrine of the "summary jurisdiction" of a Bankruptcy Court and the equitable doctrine of "comity". The *Luther* case has no application to the subject of comity.

(d) While it is true, normally, as contended for by Appellee in his Brief (p. 28) that an injunction, issued by a Bankruptcy Court, may be "directly appealed", it is equally true that to avail oneself of the impropriety of an injunction issued by a trial court a litigant does not necessarily have to appeal from that Order where it is merely interlocutory. He may raise the point, upon appeal, as we have here, after suffering an adverse judgment at the hands of the trial court. Appellee has placed himself upon the horns of a dilemma in this regard. On page 28 of Appellee's Brief he contends that, since Appellants took no review from the injunction issued by the Referee herein we have no right to raise the point upon appeal. The injunction was issued (T. R. p. 162) in the course of the trial of this case. Appellants' "objection to the Referee's jurisdiction" and their "plea in abatement" were overruled. (As conceded in Appellee's Brief, pp. 2-3.) Not only was the injunction here issued by the Referee "without notice" as conceded by Appellee in his Brief (p. 29), but was only made in the course of the trial after our objection to his summary jurisdiction was overruled. Such orders are interlocutory in character and this Court has held such orders not

to be subject to direct appeal. (*Goldie v. Carr,* 1940 (9th Cir.) 116 F. 2d 335.) The inapplicability of the decision of this Court in *Danning v. United States,* 1958 (9th Cir.) 259 F. 2d 305 (Appellee's Brief, p. 31), to the case at bar is clear when one examines the decision and finds that this Court did not undertake to approve the rule in the *Nathan* case (supra) but merely recited that the parties to that action had *conceded* the point for which the case in question is here cited by Appellee. This point, Appellants here do *not* concede.

(e) On the subject of the obvious impropriety of the Referee in this case having undertaken to do indirectly that which he is prohibited from doing directly, i. e., restraining a State Court we reiterate the applicability of the decision of *Brehme v. Watson,* 1933 (9th Cir.) 67 F'ed 2d 359. The inapplicability of the decisions cited by Appellee on this point (his brief, pp. 34-35) is clear because the injunctions there granted by Bankruptcy Courts were not indirectly injunctions against State Courts but merely enjoined *individuals* from interfering with the due administration of the bankrupt estate by the Bankruptcy Court.

---

3. APPELLANTS AT NO TIME CONSIDERED THE BANKRUPT THE REAL PARTY IN INTEREST IN THE STATE COURT ACTION.

(a) While it may be true the theory upon which this case was tried by Appellee was that the Bankrupt was the true owner of the contract and his Trustee in

Bankruptcy the real party in interest, at the outset, it will appear from Appellants' motion to withdraw this claim (T. R. pp. 37-38) that Appellants have consistently contended the contrary throughout this proceeding (T. R. p. 42) and have adopted the allegation (T. R. pp. 13-14) and the admission (T. R. pp. 22-30) in the pleadings in the State Court action that there had been an assignment of the contract by the Bankrupt to Snow Camp Logging Co., a corporation. We merely urged that comity required the identical subject matter be tried in the Court in which it first had become at issue and already set for trial. Immediately upon Appellee's adoption of the corporation's allegation of that assignment but at the same time his allegation that the assignment was made "without any consideration whatsoever" (T. R. p. 32), in Appellant's Response, *after* our motion to withdraw the claim and to have the case tried in the State Court was denied by the Referee on the Trustee's objections thereto we challenged the Trustee's theory. (T. R. p. 42.) At no place in the record by evidence, oral or documentary, did the Trustee introduce proof to support his allegation that the assignment was "without any consideration". Hence, since there was no issue ever raised by us as to the existence of the assignment from the bankrupt to the corporate plaintiff that was an established fact and, as such, required no proof. Whether or not pleadings are evidence is thus immaterial, *but* the issue as to the lack of consideration for the assignment not only was susceptible of but also required proof, and the burden was on Appellee to

prove it since he had alleged it and he completely failed to do so.

(b) Appellee's first attempt to answer Appellants' contention that the bankrupt had assigned the contract before bankruptcy and had no rights in the same is to assert that Appellants considered the Bankrupt as the real party in interest. Even if true, this would not take the place of proof necessary to establish the Trustee's allegations of his "counterclaim." (T. R. pp. 31-33.) However, there is no basis for Appellee's argument. As we have said above, in the State Court proceeding the plaintiff alleged the assignment and it was *admitted* by Appellants. Thus no issue was ever joined as to the contract in question having been assigned by the Bankrupt to the corporation. Appellants' motion to proceed in the State Court was denied and the Referee forced Appellants to try the case on its merits. However, this did not shift the burden of proof and require Appellants to prove the allegations of the Trustee's counterclaim. This seems to be the basis of Appellee's argument. Appellee is in error in stating that the only evidence indicating a possible assignment were the State Court pleadings. The counterclaim filed by the Trustee (T. R. p. 32), in effect, admits the assignment.

Appellee cites many cases holding that in the determination of the real party in interest and in placing the burden of proof the Federal Courts will apply State law. This is not disputed, and we would even emphasize the point and urge that one of the cases cited by Appellee sustains the very contention

made by us. *New York Life Insurance v. Rogers,* 1942 (9th Cir.) 126 F. 2d 784, at 788. This case held that where a defendant alleges affirmative matter on which it intends to rely the issues are thereby so narrowed that the burden is on the defendant to show by a preponderance of evidence the existence of the facts so alleged by it.

> "The Supreme Court of Arizona has recently held that, although the burden of proof on the whole case never shifts, yet when the defendant by its answer admits allegations of the complaint sufficient to make out a prima facie case for the plaintiff, and then alleges further affirmative matters on which it intends to rely, the issues are thereby so narrowed that the burden is on the defendant to show by a preponderance of the evidence the existence of the facts so alleged by it, and an instruction to that effect is not erroneous."

In the case at bar, the allegations being part of the counterclaim (T. R. p. 32) and not just a mere defense the burden is even more specifically placed upon Appellee.

> *Allis-Chalmers Mfg. Co. v. U.S.,* 79 Ct. Cl. 453;
> *New York Life Ins. Co. v. Rogers* (supra).

Thus, Appellee's admission of the assignment of the contract (T. R. p. 32) and his allegation that the assignment was without any consideration and that the claim "is a valuable asset of the estate" has raised an issue of ultimate fact and the burden of its proof is upon Appellee.

(c) Appellee next contends that even though he did allege in his counterclaim that the contract was assigned by the bankrupt this is not evidence; and in support of this argument cites numerous cases to the effect that pleadings are not evidence *in support* of the pleader. This also we admit, but point out that Appellee has cautiously evaded the point made in Appellants' Brief, which is that an admission contained in a pleading is admissible *against* the pleader thereof.

Pullman Co. v. Bullard, 44 F. 2d 347;
Howard v. Halstead, 298 F. 1020;
New Jersey Zinc v. Singmaster, 4 F. Supp. 967;
Giannone v. U.S. Steel Corp., 238 F. 2d 544.

Appellee then seems to believe it necessary to cite authorities to establish that it is only necessary to plead ultimate facts and not evidentiary matters. Our point is that Appellee has not pointed out and cannot point out any "evidentiary matter" in the record to establish the ultimate fact of ownership of the contract as alleged by Appellee in his counterclaim. Although Appellee's Brief (p. 37, 5a) commenced this line of argument with the contention that there was evidence supporting the Finding that the Trustee owned the rights under the contract, not one reference supporting this argument has been made to the record, except to the opinion of the District Judge which was not supported by any evidence in the record. The District Judge apparently did not read the record very carefully or he could not have made the statement (which was part of his Memorandum and Order):

> "the only record before this Court is the transcript of proceedings had to determine which party breached the contract, and the extent of the damages. The issue of ownership was decided adversely to petitioners before that time". (T. R. p. 74.)

The transcript before him was complete and showed that there were *no other proceedings* which had decided the issue of ownership, and the errors of the Referee were specifically pointed out to the District Judge. (T. R. p. 62, paragraph 19.)

As if in desperation, Appellee seizes upon this remark of the District Judge to contend that somewhere else there exists support for the assertion that Appellee was in fact the true owner of the contract which was in litigation in the Humboldt County Superior Court and says (his brief, p. 43): "In any event the burden is upon the Appellants to point out *specifically* the error of the Court below and the *recorded facts* demonstrating the error", citing *Humphries Gold Corporation v. Louis,* 1937 (9th Cir.), 90 F. 2d 896. Without having brought forward the record surrounding the ruling, how can Appellants successfully attack or criticize it? The full answer to that argument is that the District Court had before it the entire record with all the testimony and all the exhibits introduced at the hearing of Appellee's objection to Appellants' claim upon which arose the judgment and decree against Peters for the huge sum involved in this appeal.

Appellee grasps at straws in trying to establish an analogy here with promissory note-contract cases holding that the presentation of a promissory note duly endorsed to the plaintiff entitles the Court to presume that plaintiff was its owner. A promissory note is evidence of indebtedness. In order to establish such an analogy an additional (and unwarranted) assumption would have to be made. Suppose the promissory note had an endorsement showing it had been assigned to a party other than the plaintiff. Would the Court make any assumption without some showing of a right in the plaintiff? Here, Appellee admitted an assignment by his predecessor in interest. This was evidence to negate any presumption of ownership in Appellee yet he failed to offer any proof of the ultimate fact alleged, viz: that the claim was "an asset of the estate of the Bankrupt".

Appellee's only argument on this subject that we believe has merit is the statement that this case should be decided on proof and not on pleadings. *Proof of the ultimate fact by the party bearing the burden of proof.* (Appellee.) The pleadings set forth the issues of the case as joined by the parties. It is submitted that, after admitting the assignment and alleging the lack of consideration therefor and that the contract was (therefore) an asset of the bankrupt estate, not one word or document tending to prove this ultimate fact of ownership, alleged by him, was offered by Appellee.

4. THERE WAS AN ANTICIPATORY BREACH OF THE CONTRACT BY THE BANKRUPT.

We submit that Appellee, in his brief, has not successfully answered points raised by Appellants in our Opening Brief on the above subject. Contrary to the observation of Appellee that for the entire period of 1953 actual production was shown to be approximately 2,200,000 feet per month (his brief, p. 49), Trustee's Exhibit No. 15 (as was pointed out in A.O.B. pp. 38-39) showed it to be only 2,020,606 feet per month. (Exhibit 15 is a summary of Exhibit 14.) That "ganglogs can also be called studlogs" is not a "gratuitous statement" (as contended by Appellee on page 52 of his brief). See T. R. p. 365:

> "Q. I understand that. As a matter of fact, a gang log and a stud log is a similar log, is it not?
>
> A. To a degree, yes. . . .
>
> Mr. Goodwin. Mr. Vander Jack already testified that stud logs and gang logs are similar logs.
>
> Mr. Margolis. He did not say very similar. He said similar, yes. I will stand on the record.
>
> The Referee. Let's see what Mr. Vander Jack said. I think you are both misquoting what he said."
>
> * * * * * * *
>
> "* * * Gang logs can also be called stud logs. You can cut them to dimension."

---

5. ATTEMPT OF APPELLANT PETERS TO TESTIFY AS TO CONTENTS OF RECORDS WITHOUT PRODUCING SAME; AND THERE WAS AN ACTUAL BREACH BY THE BANKRUPT.

Appellee carefully refrains from calling the Court's attention to the fact that, as is indicated in the rec-

ord (T. R. pp. 456-459) Appellants' offer to produce such records was conditional, not unqualified and we were never ordered to produce them.

> "Mr. Stark. . . . Now, we will produce these records *if we conclude,* after consulting with each other, *that it is vital* to the *interests of our client* that we produce them. But we don't want to keep your Honor sitting here day after day with time we can ill afford to spend, when this witness, as the head of this company, is prepared to say unequivocally that, after Mr. Vander Jack left the scene of this debacle, he was required to go out at additional expense, the amount of which he knows of his own knowledge, and get fodder for his mill." (Italics ours.) (T. R. pp. 458-459.)

Apparently, Appellee does not find fault with our argument that "there was an actual breach by the bankrupt" of the contract in question (see A.O.B. pp. 28-31); nor does Section 1855 of the California Code of Civil Procedure constitute authority which would support the Referee's rejection of the secondary evidence to which due exception was taken by Appellants. As additional support for our previous assertion that the Bankrupt itself was in default under the timber contract *prior* to the alleged breach thereof by Appellants on October 21, 1953, we cite (in Appendix "F") competent uncontradicted testimony on the subject. This indicates clearly that the Bankrupt, Snow Camp Logging Co., sold, contrary to the provisions of paragraph 8, of the June 1, 1951 Agreement, gang-type logs from the Redwood Creek area after Appellants were in full production. We also

cite (in Appendix "F") some evidence to show that Appellants did not buy logs elsewhere until *after* the Bankrupt stopped deliveries.

---

6. THERE WAS AN ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND APPELLANTS.

An examination of Appellee's brief on the above subject will indicate that there is little, if any, difference between the parties as to the law involving the doctrine of "accord and satisfaction". Appellee apparently takes little issue with Appellants' citation of evidence to support our contention that there was a bona fide dispute between the parties which would give rise to the accord and satisfaction. Appellee, on page 57 of his Brief, blithely indicates in testimony the witnesses' conclusion "there was no dispute about that". However, Trustee's Exhibit No. 4 (Appendix "C", A.O.B., Trustee's Exhibit No. 5, and Claimant's Exhibit No. 4 (Appendix "B", A.O.B.) all constitute evidence supporting the existence of a bona fide dispute, which is all that is required to support the accord and satisfaction for which Appellants contend. The mere conclusion of the witness C. C. Vander Jack (T. R. p. 403) that there was no dispute cannot support the Referee's finding to that effect in the face of the documentary evidence to the contrary.

7. THE ASSESSMENT OF DAMAGES MADE BY THE DISTRICT COURT WAS CLEARLY ERRONEOUS.

Appellee seems to have just as much trouble in trying to justify the award of damages as Appellants had in determining how the damages were computed in the light of the evidence before the Referee.

Because we stated in our brief that we understood how the Referee arrived at the sum of $19,625.91 *if* his Finding No. 10 (T. R. p. 49) were correct and how he arrived at the sum of $30,931.57 *if* his Finding No. 11 (T. R. p. 50) is correct, Appellee has assumed, without any basis, that we concur in these items. We do not. We have already discussed the Accord and Satisfaction involving the $19,625.91. As to the purported loss of truck earnings of $30,931.57, there is no evidence to support this figure. Appellee admits that the burden of proof on items of damages rested with him, yet he fails to point to any evidence in the record which shows that the Bankrupt ever earned $3,000.00 per month gross per truck and that, were it not for Appellants' purported breach, it would ever have earned it. In fact, the evidence showed that the Bankrupt actually earned $105,000.00, less than the $3,000.00 per truck average, only 30% of which was chargeable to Appellants. The Bankrupt didn't earn at the $3,000.00 per month per truck rate even on the other 70%.

Appellee's attempt to point out the basis for the award of $146,319.00 for disruption of normal procedures is even more vague and equally erroneous. If allowable at all, this item could not exceed $58,510.50 as pointed out by us, in our Statement of Facts, supra.

It is admitted that Appellants only received 40% of the lumber hauled by the Bankrupt and could only be charged with 40% of the total costs. (T. R. p. 312.) Yet, the award of damages for "disruption of normal operating procedures" is not limited to 40% of the operating costs involved in the so-called 30% loss of efficiency caused by Appellants' purported mismanagement. Trustee's Exhibits Nos. 14-18 (T. R. pp. 297-321) nowhere reflect this situation nor do they throw light on the method used in the computation of damages.

In discussing the award of $477,750.99 Appellants proved an actual mathematical error on the part of the Referee to the extent of at least $53,083.49. (A.O.B. pp. 38-39.) Appellee did not have the temerity to meet this issue honestly and concede the obvious. He states (Appellee's Brief, p. 60) that it cannot be concluded that the damages were computed on this basis. Yet, Appellee points to no other basis for such computation of damages. (Trustee's Exhibit No. 15.) This type of quibbling is typical of the entire lack of ability on the part of Appellee to pinpoint any evidence in the record to support the Referee's award of damages. Appellee admitted that he was required to prove damages but here again he goes outside of the record to try to support the Referee's award. We argued (A.O.B. p. 40) that Bankrupt did not have sufficient lumber to supply Appellants for a period of 91 months, the unexpired term of the contract considering the fact that Appellants only received 40% of the total supply. Apparently, Appellee has to concede this but attempts to overcome this dis-

astrous fact by stating that this argument does not take into consideration "future acquisitions of inventory". There is no evidence in the record of the Bankrupt building up inventory nor acquiring any. Here again, Appellee failed to meet his burden of proof. He would have to show, not only that inventory would be available, but also that Bankrupt could and would have acquired it in the immediate vicinity so that it would still be in a position to enjoy the $2.31 per thousand price advantage. It was only because of the location of this timber and the fact that it did not have to be hauled over State or County roads it could be delivered to Appellants' dump at a $2.31 per thousand advantage to the Bankrupt. If the Bankrupt had to pay extra or even normal hauling charges on the so-called "future inventory acquisition" (the existence of which does not appear in the record) there would be no such, nor any advantage. The burden of establishing all items of damage must be borne by Appellee.

Hahn v. Wilde, 211 C. 52, 293 P. 30;

Parke v. Frank, 75 Cal. 364;

Tremorli v. Austin Trailer Equip. Co., 102 C.A. 2d 464; 227 P. 2d 923;

Kowtko v. Del. & Hudson R. R. Corp., 131 F. Supp. 95;

Continental Oil Co. v. Fisher Oil Co., (10th Cir.) 55 F. 2d 14;

Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., (5th Cir.) 194 F. 2d 586;

Sapp v. Barenfeld, 34 C. 2d 575, 212 P. 2d 233.

The contract (T. R. p. 6) contemplates that the timber would be supplied from the Redwood Creek Ranch and vicinity. The evidence showed the maximum amount that could be realized from this area and that it would be insufficient to supply the quantity of timber required by Appellants over the 91 months term remaining under the contract, considering that Appellants only received 40% of the total amount logged by Bankrupts. Timber is not like merchandise which may be obtained anywhere, anytime, and Appellee apparently concedes this in stating (Appellee's Brief, p. 50):

> "The contract contemplated the operations of both parties in the Redwood Creek area only (T. 6, T. 9, Section 13, T. 10, Section 17), and accordingly obligated log production of the Sellers in that area only."

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8. DISTRICT COURT'S ORDER IS ITSELF ERRONEOUS.

Appellee's final argument brings out a point which is not disputed but which, as we have pointed out on several occasions, is not involved here. We concede that unless it can be shown that the Court's findings of fact are clearly erroneous, they should not be set aside. We further concede that where a Finding of a Referee or Judge is based on conflicting evidence, it will not ordinarily be disturbed on appeal. However, it is equally true (and we believe this to be the situation before this Court), that a finding supported by no evidence or which in fact is an erroneous conclu-

sion (factual or otherwise) drawn from undisputed testimony may be disregarded by the Appellate Court which can draw its own inference or conclusions from such non-conflicting testimony.

Costello v. Fazio (9th Cir.) 256 F. 2d 903;
In re Morasco (2d Cir.) 233 F. 2d 11;
Sheldon v. Waters (5th Cir.) 168 Fed. 2d 927.

> "Ordinarily, when a Referee in Bankruptcy has made findings of fact based on conflicting evidence, and the Referee has actually heard the witnesses, great weight is attached to his conclusions, and they will not be disturbed unless 'clearly erroneous' . . . *But where credibility of witnesses is not involved and the facts are undisputed, the District Judge and the Court of Appeals can more freely draw differing inferences from the undisputed facts.*" (*In re Morasco,* supra, at page 15.)

Appellants' specifications of error in the findings as previously pointed out are based on the fact that they are, in many cases, unsupported by any evidence or that the legal inference or "factual conclusion" drawn from undisputed facts is incorrect or that certain specified rulings of the Referee were prejudicially erroneous.

We believe that we have demonstrated in an unanswerable manner at least two startling mathematical errors made by the Referee in Bankruptcy in this award of so-called damages for the breach of the contract and which award was in toto adopted by the District Court and we earnestly contend that no man

should be deprived of the fruits of a lifetime of labor on the basis of the record which is presently before this Court and we submit that the Memorandum and Order of the District Judge made on October 30, 1958, affirming the Order, Judgment and Decree of the Referee in Bankruptcy dated March 25, 1958, should be by this Court reversed with appropriate directions to the District Court.

Dated, San Francisco, California,
September 14, 1959.

Respectfully submitted,
ARTHUR P. SHAPRO,
HUBER & GOODWIN,
L. W. WRIXON,
CHARLES M. STARK,
PAUL W. McCOMISH,
By CHARLES M. STARK,
Attorneys for Appellants.

(Appendix "F" Follows.)

Appendix.

Appendix "F"

Testimony of Dan Dare.

Transcript of Record, page 224.

"Q. Referring to the summer(ary) of 1953, did you buy any logs at that time from Snow Camp Logging or Vander Jacks?

A. Yes.

Q. That was for Western Studs?

A. Uh-huh.

Q. What type of lumber does a mill such as Western Studs produce?

A. Studs."

Transcript of Record, page 225.

"Q. Now in the *summer of '53* upon what basis did you buy logs from Snow Camp Logging Company?

A. Camp run.

Q. Where is the Western Stud mill located?

A. Just north of Arcata on Highway 299.

Q. That would be described as in the Arcata area?

A. I think so.

Q. Did you, in connection with your purchase of these logs from Vander Jack, make any inspection of their timber source?

A. What do you mean?

Q. Did you go out and look at the woods that they were operating in?

A. Yes.

Q. And you observed the type of tree and type of timber that they had available?

A. Uh-huh.
Q. Did you also observe their operation?
A. Uh-huh.
Q. Was that *in the Redwood Creek area?*
A. Uh-huh." (Italics ours.)

Testimony of Benjamin A. Dare.

Transcript of Record, page 238.

"Q. Were you so employed during the summer and fall of 1953?
A. Yes; I was.
Q. And that was as log buyer at Sound Lumber Company?
A. Correct.
Q. Now is that a dimension mill?
A. Yes.
Q. Did you, on behalf of Sound Lumber Company, in the summer of 1953, buy any logs from Snow Camp Logging Company or Vander Jacks?
A. Yes; we did.
Q. Those come from their timber show in the Redwood Creek area?
A. Yes; they did."

Testimony of Gordon Walker.

Transcript of Record, page 332.

"Q. Did you deliver any logs to Timber, Inc.'s, sawmill as long as Vander Jacks were delivering logs there?
A. Not to my knowledge, no.
Q. The deliveries started after he quit?
A. Yes."